SUPREME COURT OF THE UNITED STATES.

No. 189.

JOHN A. HORBACH AND RICHARD WIGGINS, APPELLANTS,

vs.

JOHN R. PORTER AND JANE M. PORTER, HIS WIFE.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF NEBRASKA.

GOVERNMENT PRINTING OFFICE.

SUPREME COURT OF THE UNITED STATES.

No. ~~101~~ 157

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vs.

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APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF NEBRASKA.

INDEX.

	Original.	Print.
Style of court	1	1
Decree of supreme court	2	1
Bond	3	2
Bill of complaint in dist. court	7	3
Subpœna	24	8
Motion of Richard Wiggin	25	9
Demurrer of Jno. A. Horbach	26	9
Affidavit and notice of publication	27	10
Order overruling demurrer	29	11
Order overruling motion	29	11
Demurrer of Richard Wiggin	30	11
Demurrer overruled	31	12
Interrogatories filed	31	12
Deposition of Jonas Seely	37	14
Answer of Richard Wiggin	42	16
Interrogatories to be administered to R. Wiggin	51	19
Commission to take deposition	53	20
Deposition of Richard Wiggin	54	20
Replication of complainants	58	22
Order of reference	58	22
Bill taken as confessed against defendant Horbach	59	22
Motion and affidavit of Clinton Briggs	59	22
Motion to open default overruled	60	23
Motion to suppress deposition of A. J. Hanscom	60	23
Supplemental answer of Richard Wiggin	61	23
Replication to supplemental answer	63	24
Deposition of Augustus Macon	65	25
Andrew J. Hanscom	66	25
John R. Porter	74	29

	Original.	Print.
Letter from General Land Office, June 14	78	30
Oct. 15	79	31
Deed from J. S. McCormick to Jonas Seely	80	32
Jonas Seely to Jane M. Porter	82	32
Depositon of E. V. Smith	84	33
A. J. Hanscom	88	35
Augustus Macon	90	36
Jesse Lowe	93	37
M. T. Patrick	97	38
J. S. McCormick	101	40
John A. Horbach	104	42
Byron Reed	112	45
A. J. Hanscom	115	45
Letter from General Land Office, Sept. 3	115	46
Deposition of William R. Demarest	117	46
Josiah S. McCormick	119	47
Byron Reed	123	49
Motion to suppress deposition of Jonas Seely	126	50
Decree of district court	126	50
Notice of appeal	128	51
Clerk's certificate	128	51

1 UNITED STATES OF AMERICA,
Territory of Nebraska, ss:

Proceedings had in the supreme court of the Territory of Nebraska, at the June term thereof, begun and held at the capital of said Territory, on the fourteenth day of June, in the year of our Lord one thousand eight hundred and sixty-four, and adjourned by order of said court until the eighteenth day of July, in the year aforesaid, and at which were present the following named officers of said court:

Honorable William P. Kellogg, chief justice; Honorable Elmer S. Dundy, associate justice; Honorable William F. Lockwood, associate justice; Daniel Gantt, esq., attorney for United States; Phineas W. Hitchcock, esq., United States marshal; John H. Kellom, clerk of said court.

JOHN R. PORTER *et ux.*, appellees,
vs.
JOHN A. HORBACH AND RICHARD WIGGIN, appellants.

Be it remembered, that on the eleventh day of July, one thousand eight hundred and sixty-four, came into the said supreme court the said
2 John A. Horbach and Richard Wiggin, appellants, by Messrs. Redick & Briggs, their solicitors, and filed in the office of the said clerk of said court a transcript of the record of certain pleadings duly had and taken in the district court of said Territory, for the first judicial district and county of Douglas, a true copy of which transcript is hereto annexed, and marked Exhibit A.

And afterwards, at the aforesaid June term of said supreme court, and on the twenty-fifth day of July, one thousand eight hundred and sixty-four, Honorable William P. Kellogg, chief justice, and Honorable Elmer S. Dundy, associate justice, presiding, this cause came on duly to be heard and determined upon said transcript so as aforesaid filed in said court, and thereupon the following proceedings were duly had.

In the supreme court of the Territory of Nebraska.

RICHARD WIGGIN AND JOHN A. HORBACH, appellants,
vs.
JOHN R. PORTER AND JANE M., HIS WIFE. } In chancery.

This cause having come on to be heard upon the appeal from the district court of Douglas County, and the court having heard the arguments
3 of the respective counsel of the parties, complainants and defendants, and being fully advised in the premises, do affirm the decree of the court below made in this cause. And thereupon it is now here ordered, adjudged, and decreed by this court that the said decree of the district court be, and the same is hereby, affirmed, and that the appellees recover against the said appellants the costs of this suit to be taxed, (Judge Dundy dissenting.) And thereupon then and there the said defendants prayed an appeal to the Supreme Court of the United States, which appeal is hereby allowed, the said defendants having first made due proof by competent witnesses that the value of the property in controversy exceeded one thousand dollars. And the court do further order that bond for costs be required in the sum of three hundred dollars.

By the court.

W. P. KELLOGG, *Chief Justice.*
E. S. DUNDY, *Associate Justice.*

And thereupon, afterwards, to wit, on the 28th day of July, 1864, there was filed in the clerk's office of the supreme court by Messrs. Redick & Briggs, solicitors for appellants, their bond, which is in the words and figures following, to wit:

4 Know all men by these presents that we, John A. Horbach, Richard Wiggin, and George R. Smith are held and firmly bound unto John R. Porter and Jane M. Porter, his wife, in the full and just sum of three hundred dollars, to be paid to the said John R. Porter and Jane Porter, their certain attorney, executors, administrators, or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals, and dated this 25th day of July, A. D. 1864.

Whereas lately, at a term of the supreme court of the Territory of Nebraska, in a suit pending in said court between the said John R. Porter and Jane M. Porter, and the said John A. Horbach and Richard Wiggins, a decree was rendered against the said John A. Horbach and Richard Wiggins, who having thereupon at the same term of the said court, in open court, claimed an appeal from the said decree to the Supreme Court of the United States, to be holden at Washington on the first Monday of December next, and the same having been allowed:

Now, the condition of the above obligation is such that if the said John A. Horbach and Richard Wiggins shall prosecute their said appeal

5 to effect and answer all costs if they fail to make their said plea good, then the above obligation to be void; else, to remain in full force and virtue.

JNO. A. HORBACH. [SEAL.]
RICHARD WIGGIN,
By REDICK & BRIGGS, *Att'y in fact.*
GEO. R. SMITH.

Sealed and delivered in presence of and approved by me, this 25th day of July, 1864, at Omaha, Nebraska Territory.

WM. P. KELLOGG,
Judge of 1st Judicial Dist., and
Chief Justice of said Territory.

THE TERRITORY OF NEBRASKA, *County of Douglas, ss:*

I, J. H. Kellom, clerk of the supreme court of the Territory of Nebraska, do hereby certify that the foregoing copy is a true and faithful transcript of all the records and proceedings had in the above-entitled cause, so full and entire as the same remain on file and entered of record in this office.

Witness my hand and the seal of said supreme court, at Omaha, N. T., this third day of November, A. D. 1864.

J. H. KELLOM, *Clerk Sup. Court.*

7 *Exhibit A, being a true copy of a transcript of the record of the district court, filed in the supreme court of said Territory, as is above stated.*

UNITED STATES OF AMERICA,
The Territory of Nebraska, County of Douglas, ss:

Pleas before the district court, in chancery, of the first judicial district, territory and county aforesaid.

Be it remembered, that at a regular term of the district court of the first judicial district of the Territory of Nebraska, appointed to be held at the court-house, in the city of Omaha, in the county of Douglas, on Tuesday, the twenty-first day of April, in the year of our Lord one thousand eight hun-

dred and sixty-three, and adjourned by order of court until the fourth Tuesday of May following, and again adjourned by order of court until the second day of June following—present: Honorable William P. Kellogg, judge; Charles H. Brown, esq., district attorney; Thomas L. Sutton, sheriff of Douglas County, and John H. Kellom, clerk of said court—the following proceedings were had:

Heretofore, to wit, on the 23d day of April, A. D. 1863, John R. Porter and Jane M. Porter, his wife, filed in the office of the clerk and register of said court their bill of complaint, in chancery, which said bill of com-
8 plaint was in the words and figures following, to wit:

In chancery.

To the Honorable William P. Kellogg, judge of the district court of the Territory of Nebraska for the first judicial district and county of Douglas:

Humbly complaining, show unto your honor your orator and oratrix, John R. Porter, of the city of Omaha, in said county of Douglas, and Jane M., his wife, that John A. Horbach, of the said city and county, claiming to have settled upon, inhabited, and improved certain lands and premises situate in the said county and Territory, known and described as follows; that is to say, the south half of the northeast quarter and the south half of the northwest quarter of section number fifteen, (15,) in township number fifteen (15) north, in range number thirteen (13) east of the (6th) sixth principal meridian, on or about the twenty-first day of November, one thousand eight hundred and fifty-seven, proved to the satisfaction of the register and receiver of the Omaha land district, that being the district in which the said lands were situate, that he had settled upon and improved the said lands as is required by the act of the Congress of the United States entitled "An act to appropriate the proceeds of the sales of the public lands, and to grant pre-emption rights," approved September 4th, 1841, and pretending
9 to have complied with the several provisions of the said act, and with the regulations of the government made in pursuance thereof, the said Horbach did then and there, under and in virtue of the said act, enter the said lands with the said register, and thereupon that officer did make, execute, and deliver to him, the said Horbach, the usual patent certificate for said lands.

And your orator and oratrix further show unto your honor that on the day aforesaid the said Horbach was, and from thence to the day hereinafter in that behalf mentioned, continued to be, in the occupancy and possession of the said premises, cultivating, improving, and inhabiting the same.

And your orator and oratrix further show unto your honor that the aforesaid proceedings had by and before the said register and receiver, having been by them, in the due course of their official duties, reported to the honorable Commissioner of the General Land Office, such other and further proceedings were had in the matter of the right claimed by the said Horbach to pre-empt the said premises that it was by the proper officer of the land department of the government decided and ordered that the entry of the said premises, so as aforesaid by the said Horbach made, was illegal and void, for the reason, among others, that the said premises were included within the limits of the incorporated city of Omaha long prior to the time when the said Horbach had set up, or alleged, or claimed to have set-
10 tled upon the said premises; that on or about the first day of November, one thousand eight hundred and sixty, the aforesaid commissioner, by his official letter of that date, ordered the aforesaid register and receiver to cancel, upon the books of their office, the said entry of the said lands by the said Horbach made, and restore the said lands to the body of the public lands; that accordingly, and in obedience to the said direction of

the said commissioner, the said register and receiver did cancel the said entry upon their books, and that thereby the said lands were restored to the body of the public lands.

And your orator and oratrix further show unto your honor that the said lands, being an isolated or disconnected tract, and never having been offered to be sold at public auction, the said Commissioner directed the said register and receiver that they should sell the same at public auction as such tract; that the said register and receiver having, pursuant to the directions of the said Commissioner, given thirty days' notice in that behalf, on the fifteenth day of December, in the year last aforesaid, in pursuance of such notice, exposed the said lands for sale at public auction.

And your orator and oratrix further show unto your honor that the said Horbach employed one Josiah S. McCormick to attend at the said sale as a bidder, ostensibly in his own name, but in fact on behalf of said Horbach, and advanced and furnished to the said McCormick a large sum of money, to wit, the sum of about eight hundred dollars, with which to make pay-
11 ment for the said lands; that accordingly the said McCormick did attend the said sale, and then and there became, and was declared to be, the best bidder and purchaser of the said premises at and for the price or sum aforesaid; that thereupon the said McCormick, in his own name, but in fact on behalf of the said Horbach, paid to the said receiver the sums so by him bidden, the same having been advanced to him by said Horbach, as above stated; and thereupon the said officers made, issued, and delivered to the said McCormick, for said Horbach, their usual patent certificate for the said lands.

And your orator and oratrix further show unto your honor that on the day last aforesaid the said Horbach was indebted unto one Jonas Seely, esquire, formerly of the city aforesaid, in a large sum of money, the exact amount of which is to your orator and oratrix unknown, for work and labor, care, diligence, and attendance of the said Seely, by him done, performed, and bestowed as the attorney, solicitor, and counsel of and for the said Horbach in and about defending and prosecuting divers suits, causes, and matters, and transacting divers business of the said Horbach, and at his special instance and request.

And your orator and oratrix further show unto your honor that on the day last aforesaid the said McCormick, in pursuance of the direction and appointment of the said Horbach, made, executed, and acknowledged
12 his certain deed of conveyance, bearing date on the said day, whereby, for the consideration as therein expressed, of one dollar to him by said Seely paid, but in fact for the consideration hereinafter stated, he conveyed to said Seely, in fee, a certain part and parcel of the said lands known and described as follows; that is to say, commencing at the northwest corner of the southwest quarter of the northwest quarter of section number fifteen, in township number fifteen north, of range number thirteen east of the sixth principal meridian, in the Territory of Nebraska, running thence east forty rods, thence south forty rods, thence west forty rods, thence north forty rods, to the place of beginning; and the said deed did contain the covenant and agreement of the said McCormick to and with the said Seely by the said McCormick at and upon the direction of the said Horbach in that behalf made and given, that he, the said McCormick, would forever warrant and defend the said premises and the title thereto unto the said Seely, his heirs and assigns, against the lawful claims of all persons whomsoever lawfully claiming the same, by, through, from, or under him, the said McCormick, and which said deed the said Horbach, for the purpose of satisfying and discharging his aforesaid indebtedness to the said Seely, on the day last aforesaid, offered to deliver to the said Seely.

13 And your orator and oratrix further show unto your honor that in order to induce the said Seely to accept the said deed and the premises therein described, in full satisfaction and discharge of his aforesaid indebtedness to the said Seely, the said Horbach then and there did promise, covenant, and agree to and with the said Seely that he, the said Horbach, and all and every other person or persons having, or lawfully claiming, or who should or might at any time thereafter have, or lawfully claim, any estate, right, title, trust, interest at law or in equity, of, into, or out of the premises by the said deed granted, or any part thereof, should and would at all times thereafter make, do, and execute, or cause and procure to be made, done, and executed, all and every such further and other lawful act and acts, conveyances, and assurances in law whatsoever, for the better, further, more perfect, and absolute granting, conveying, and assuring the premises by the said deed granted, to be thereby granted, released, and confirmed unto, and to the use of, the said Seely, his heirs and assigns, forever, as by the said Seely, his heirs or assigns, should be reasonably required.

And your orator or oratrix further show unto your honor that the said Seely, reposing full faith and confidence in the said Horbach, and in such his promise, covenant, and agreement, and in consideration thereof, then and there accepted, and received of and from the said Horbach the aforesaid deed, conveying the said premises to him in full satisfaction and discharge

14 of the indebtedness of the said Horbach to him as aforesaid, by virtue of which said grant and conveyance the said Seely afterward, and on the day last aforesaid, entered into the said premises, and became and was seized thereof in his demesne as of fee, which deed was on said day duly recorded in the office of the register of said county, as by the said record will on reference appear.

And your orator and oratrix further show unto your honor that the said Seely being desirous of removing from this Territory and selling the said premises, on or about the first day of February, one thousand eight hundred and sixty-one, offered the said premises to your oratrix for sale; that the said Horbach was, pending the negotiations between the said Seely and your oratrix for the purchase and sale of the south half of the said premises, well advised that your oratrix and said Seely were treating in that behalf, and that your oratrix had agreed with the said Seely to pay to him, the said Seely, the sum of three hundred dollars for the same, and was about to consummate such her agreement by paying to said Seely the said sum, and receiving from him a conveyance of said premises, yet the said Horbach concealed from your orator and oratrix, and each of them, the fact that he had, or claimed to have, any right, title, interest, claim, or demand of, in, to, or upon the said premises, or any part thereof, although your orator and

15 oratrix were, and each of them was, totally ignorant thereof.

And your orator and oratrix further show unto your honor that your orator and oratrix, being each of them so as aforesaid ignorant of the fact that the said Horbach had, or claimed to have, any right, title, interest, claim, or demand of, in, to, or upon the said premises, with the knowledge of the said Horbach, on the twenty-sixth day of February, in the year last aforesaid, your oratrix purchased the last above-mentioned premises from the said Seely for the agreed price of three hundred dollars, by your oratrix, out of her separate estate paid to said Seely therefor; whereupon the said Seely made, executed, acknowledged, and delivered to your oratrix his certain deed of conveyance, bearing date on said day, whereby, for the consideration aforesaid, he, together with Cornelia, his wife, conveyed to your oratrix the said premises in fee; that said deed was on the day next after its date recorded in the office of the register of deeds of the said county in Book of Deeds "N," at page 203, as by the same and the certificates of acknowl-

edgment thereto annexed, and of the recording thereof thereon indorsed, ready to be produced, as your honor shall direct, will more fully appear.

And your orator and oratrix further show unto your honor that by virtue of the said grant and conveyance your orator afterward, to wit, on the day and year last aforesaid, entered into the said premises, and became
16 and was seized thereof in his demesne as of fee with the knowledge of the said Horbach, and being so possessed thereof as aforesaid and with the knowledge of the said Horbach, at an expense and to the value of the sum of one hundred and fifty dollars and over, improved, cultivated, and fenced the same, and from thence to the day of the filing of this bill your oratrix has, by virtue of and under the said deed, occupied and possessed said premises; nor for a long space of time thereafter, to wit, one year and over, had your orator and oratrix, or either of them, any knowledge whatever that said Horbach had, or claimed to have, any interest in said premises.

And your orator and oratrix further show unto your honor that on or about the first day of April, one thousand eight hundred and sixty-two, upon some proceeding or proceedings by the said Horbach procured to be had, but by what means he so procured the same to be had, and what the nature thereof was, your orator and oratrix, and neither of them, is informed, the honorable Secretary of the Interior reversed the decision made in and by the land department of the government, as hereinbefore stated, and decided that the lands first above described were subject to the operations of the act first above entitled, notwithstanding the same were included within the
17 limits of the incorporated city of Omaha, and ordered that the entry so as aforesaid made by the said Horbach under and by virtue of said act, should be restored to the same condition and plight in which the same was on the day of the making thereof; and that the purchase so as aforesaid made at public auction by the aforesaid McCormick on behalf of said Horbach be canceled and vacated, and that the usual note thereof be by the aforesaid register and receiver made in the books of their office, and that the sum of eight hundred dollars so as aforesaid bidden by the said McCormick for the said lands, and by him, out of funds in that behalf furnished to him by said Horbach, paid therefor, be refunded to the person entitled thereto, upon the return to the said land department of the patent certificate, so as aforesaid at the said public sale made, issued, and delivered to the said McCormick.

And your orator and oratrix further show unto your honor that on or about the day aforesaid the said Horbach surrendered the patent certificate last above mentioned, and thereupon the aforesaid sum of eight hundred dollars by him paid, or by said McCormick for him paid, for the said premises, was by the proper officer of the government repaid to the said Horbach; that your orator and oratrix were, and each of them was, totally ignorant
18 of all and every the aforesaid proceedings, and the same were by all the persons, parties, and officers engaged therein, concealed from your orator and from your oratrix, and so the said purchase made by the said McCormick was vacated and canceled, and altogether held for and made nought by the aforesaid land officers and the said Horbach; and thereupon the usual letters-patent of the United States were made, issued, and delivered by the proper officer or officers of the government to the said Horbach, whereby the said premises first herein described were, in virtue of the act aforesaid and his entry aforesaid, by the United States granted unto the said Horbach, to have and to hold to him and his heirs in fee simple forever.

And your orator and oratrix further show unto your honor that on the twenty-third day of April, in the year last aforesaid, the said Horbach, to-

gether with Sallie, his wife, by their deed of conveyance bearing date on said day, conveyed to Richard Wiggin, of Allegheny City, in the State of Pennsylvania, the premises hereinbefore stated to have been by said *said* McCormick conveyed to said Seely, and that in and by the said deed the said Horbach did covenant and agree to and with the said Wiggin that he
19 was lawfully seized of a good and indefeasible estate in fee simple of and in the said premises, and that he had good right and lawful authority to sell and convey the same; that the same were free and clear of all incumbrance, and that he, the said Horbach, would warrant and defend the said premises against the lawful claims of all persons whomsoever; that the said deed was afterwards recorded in the office of the register of deeds of the said county of Douglas, as by the record thereof, reference being had thereunto, will more fully appear; and your orator and oratrix charge that at the making of said deed said Wiggin had due notice of the rights of your oratrix in the said premises.

And your orator and oratrix further show unto your honor that the said Richard Wiggin threatens and intends to bring an action of ejectment against your oratrix in order to turn your oratrix out of the possession of the said premises, unless he be restrained therefrom by the order and injunction of this honorable court.

And your orator and oratrix well hoped that the said Horbach and the said Wiggin would have released to your oratrix all right, title, and interest by them, or either of them, had or claimed of, in, or to the aforesaid prem-
20 ises conveyed to your oratrix, and would have altogether desisted from alleging or setting up any claims to the said premises, as in equity and good conscience they ought to have done.

But now, so it is, may it please your honor, the said John A. Horbach and Richard Wiggin, combining and confederating together, and with divers other persons to your orator and oratrix unknown, whose names when discovered your orator and oratrix pray may be inserted herein with proper and apt words to charge them as parties defendant hereto, and contriving how to wrong, injure, and oppress your oratrix in the premises absolutely refuse so to do, all of which actings, doing, and refusals tend to the manifest wrong, injury, and oppression of your oratrix in the premises.

In tender consideration whereof, and forasmuch as your oratrix is without adequate remedy at and by the strict rules of the common law, and can only have relief in a court of equity where matters of this and the like nature are properly cognizable and relievable.

To the end, therefore, that the said John A. Horbach and Richard Wiggin and their confederates, when discovered, may upon their several and respect-
ive corporal oaths full, true, direct and perfect answer, make to all
21 and singular the matters and things hereinbefore stated and charged, and that as fully and particularly as if the same were here repeated, and they thereto severally and specially interrogated, and that they shall so answer not only to the best of their several knowledge and remembrance, but also to the best and utmost of their several and respective hearsay, information, and belief, and that the said John A. Horbach and Richard Wiggin may be decreed to release to your oratrix all right, title, interest, claim, or demand by them or either of them had, held, acquired or claimed of, in, to or upon the premises so as aforesaid by the said Seely conveyed to your oratrix, and that it may be referred to a master to settle such conveyance, if the parties should differ about the same, and that the said defendants may in the mean time be by the order and injunction of this honorable court restrained from bringing any action of ejectment against your oratrix, to turn her out of the possession of the said premises, and that your orator and oratrix may have such other and further relief as the nature of this case shall require, and shall be agreeable to equity.

May it please your honor, to grant unto your orator and oratrix, not only
22 the most gracious writ of injunction of the Territory issuing out of and under the seal of this honorable court, to be directed to the said John A. Horbach and Richard Wiggin, and to their attorneys, agents, solicitors, trustees, and counsellors of each of them, to restrain them and each of them from proceeding at law touching any of the matters in question as aforesaid, but also the most gracious writ of subpœna of the Territory, to be issued and directed in like manner, commanding the said Horbach and Wiggin at a certain day, therein to be inserted, personally to be and appear before your honor in this honorable court, and then and there to answer the premises, and further to stand to, perform, and abide such order and decree therein as to your honor shall seem to be agreeable to equity and good conscience.

And your orator and oratrix will ever pray, &c.

JOHN R. PORTER.
JANE M. PORTER.

JAMES M. WOOLWORTH,
Solicitor and of Counsel for the Complainants.

TERRITORY OF NEBRASKA, *County of Douglas, ss:*

John R. Porter, being duly sworn, says he is one of the complainants in the foregoing bill of complaint by him subscribed; that he has read the same, and knows the contents thereof, and that the same is true of his own
23 knowledge, except as to the matters therein stated on information and belief, and as to those matters he believes it to be true; that Richard Wiggin is one of the defendants in said bill, and that service of subpœna cannot be made upon him in this Territory; that he does not reside within the same, and that the subject of said bill is certain real estate in the said Territory, and that the said Wiggin claims an actual interest therein.

JOHN R. PORTER.

Subscribed in my presence, and sworn to before me this 21 day of April, A. D. 1863.

B. E. B. KENNEDY,
Mayor and ex officio Justice Peace.

District court, in chancery, Douglas County, Omaha, April 23d, 1863.

Before Daniel Gantt, esq., master.

JOHN R. PORTER AND JANE M., HIS WIFE,
vs.
JOHN A. HORBACH AND RICHARD WIGGIN, defendants.

It appearing that Richard Wiggin is a non-resident of this Territory, and cannot be served with subpœna therein, and claims an interest in certain real estate which is the subject of the above-entitled suit, and is situate in said Territory, on motion of James M. Woolworth, solicitor for the complainants, it is hereby ordered that due notice to him of the pendency of
24 this suit be published in the daily Omaha Nebraskian newspaper.

DAN. GANTT, *Master in Chancery.*

DOUGLAS COUNTY, *N. T.:*

And thereupon, afterwards, to wit, on the said 23d day of April, A. D. 1863, there issued out of and under the seal of said court a subpœna in said cause, which said subpœna was in the words and figures following, to wit:

The Territory of Nebraska, to John A. Horbach greeting:

We hereby command you that you appear in our district court of the first judicial district, within and for the county of Douglas, in chancery, on

the 25th day of May, 1863, to answer a bill of complaint exhibited against you and Richard Wiggin, in our said court by John R. Porter and Jane M., his wife, and to do further and receive what our said court shall have considered in that behalf. The sheriff of Douglas County will return this writ on the 4th day of May, A. D. 1863.

Witness Hon. William P. Kellogg, judge of our said court, the 23rd day of April, 1863.

[SEAL.] J. H. KELLOM, *Register, Solicitor.*

On the back of which said subpœna were endorsed the following words and figures, to wit: "No. 263, district court, Douglas County, in chancery. John R. Porter *et ux. vs.* John Horbach *et al.* Subpœna in chancery.

25 APRIL 24th, A. D. 1863.

At 3 o'clock p. m. received this writ. Served April 25th, A. D. 1863, by delivering a copy of this writ to John A. Horbach personally.

Fees 75. THOMAS L. SUTTON,
Sheriff of Douglas County, N. T.

Filed April 27, 1863.

J. H. KELLOM, *Register.*

And afterwards, to wit, on the 19th day of May, A. D. 1863, the said defendant, Richard Wiggin, filed in the office of the clerk of said court, a motion in said cause, which said motion was in the words and figures following, to wit:

In chancery, in the district court, Douglas County, Nebraska.

JOHN R. PORTER, comp'nt,
vs
JNO. A. HORBACH *et al.*

And now comes the defendant Richard Wiggin, by his sol., Redick & Briggs, for the special and only purpose of making this motion and for no other, and moves the court to dismiss this suit, so far as this defendant is concerned, for the following reasons, to wit: 1st, the subpœna is not directed to the defendants as required by the rules of this court; 2nd, there was no affidavit filed that the defendant could not be served with process as required by law to authorize publication.

REDICK & BRIGGS,
Sol. for Wiggin in this motion

And to wit, on the said 19th day of May, A. D. 1863, the said de-
26 fendant, John A. Horbach, filed in the office of the clerk of said court his demurrer to said bill of complaint, which said demurrer was in the words and figures following, to wit:

In chancery, in the district court, Douglas County, Neb.

JOHN R. PORTER, complain't,
vs.
JOHN A. HORBACH *et al.*, respondent.

This defendant, by protestation, not confessing or acknowledging all or any of the matters or things set forth in said bill of complaint to be true, doth demur thereto, and for cause of demurrer showeth that the said com-

plainant has not stated and does not make by his said complaint such a case as to entitle him to the discovery and relief prayed; 2d, the bill shows that said Seely took the deed of McCormick to the land in dispute in full satisfaction of the indebtedness of this defendant to him, and it does not appear by the bill that Horbach agreed in any legal way to warrant and defend the title of McCormick. If any such agreement, it would have to be in writing, which does not so appear by the bill, but simply alleges there was such an agreement. Wherefore this defendant asks the judgment of this hon. court whether this defendant be compelled to make any other or further an-
27 swer, and prays to be hence dismissed with costs.

REDICK & BRIGGS, *Sol. for Horbach.*

And thereupon, afterwards, to wit, on the 13th day of June, A. D. 1863, there were filed in the office of the clerk of said court, a notice to the defendant Richard Wiggin, and an affidavit of the publication of said notice, which said notice and affidavit were in the words and figures following, to wit: "Legal notice to Richard Wiggin: Take notice of a bill of complaint exhibited in the district court in chancery of the Territory of Nebraska, for the first judicial district and county of Douglas, by John R. Porter and Jane M., his wife, against you and John A. Horbach, the object and prayer of which bill is that you and the said Horbach be decreed by said court to release to the said Jane M. all right, title, interest, and claim or demand by you or either of you had, held, acquired, or claimed of, in, to or upon that certain piece of land situate in said county, and known as the south half of that certain piece of land described as follows, commencing at the northwest corner of the southwest quarter of the northwest quarter of section 15, township 15, range 13 east, 6th principal meridian; running thence east 40 rods, thence south 40 rods, thence west 40 rods, thence north 40 rods, and that you be enjoined from bringing any action of ejectment to turn said Jane M.
28 out of possession thereof, and for a general relief. You are required to appear and plead, answer, or demur to said bill on the first day of June, 1863.

"JAS. M. WOOLWORTH, *Sol'r for Compl't.*"

TERRITORY OF NEBRASKA, *County of Douglas, ss:*

I, M. H. Clark, being duly sworn, on my oath, do say that the notice hereunto attached was published for five consecutive weeks next after the 23d day of April, A. D. 1863, in the daily Omaha Nebraskian, a newspaper published by M. H. Clark, and printed in said county of Douglas, and which was during that time in general circulation in the county of Douglas, and Territory of Nebraska.

M. H. CLARK.

Sworn to and subscribed before me this 2d day of June, A. D. 1863.

[SEAL.] BYRON REED,
Notary Public for Douglas Co., N. T.

Fees: Publication, $7 50; affidavit .

And thereupon, afterwards, to wit, on the 20th day of June, A. D. 1863' there were entered on the journal in the office of the clerk of said court two orders made in said cause by the court, William P. Kellogg, judge, one overruling the said demurrer of defendant Horbach, and the other overruling the said motion of defendant Wiggin; which said orders respectively were in the following words and figures, to wit:

29 At a district court in chancery, held at the city of Omaha, within and for the county of Douglas, on the 20th day of June, 1863.
Present: The Honorable William P. Kellogg, judge.

JOHN R. PORTER
vs.
JOHN A. HORBACH, IMPLEADED WITH RICHARD WIGGIN.

The demurrer of the defendant Horbach to the bill of complaint filed in this cause having this day come on to be heard, was argued by counsel, and thereupon it is ordered that the said demurrer be, and the same is hereby, overruled. And it is further ordered that the said defendant answer said bill within sixty days from the date hereof. And thereupon defendant prays an appeal.

WM. P. KELLOGG, *Judge,*

At a district court in chancery, held at the city of Omaha, within and for the county of Douglas, on the 20th day of June, 1863.
Present: The Honorable William P. Kellogg, judge.

JOHN R. PORTER
vs.
RICHARD WIGGIN IMPLEADED WITH JOHN A. HORBACH.

30 The motion to dismiss this suit and the proceedings had therein for bringing said defendant Wiggin into court having come on to be heard, was argued by counsel; and thereupon it is ordered that the same be, and is hereby, overruled.
And thereupon defendant prayed an appeal.

WM. P. KELLOGG, *Judge.*

And thereupon, afterwards, to wit, on the 11th day of July, A. D. 1863, the said defendant Wiggin filed in the office of the clerk of said court his demurrer to said bill of complaint; which said demurrer was in the words and figures following, to wit:

In district court, Douglas County, in chancery.

JOHN R. PORTER, compl'nt,
vs.
JOHN A. HORBACH *et al.*

The defendant R. Wiggin, by protestation, not confessing all or any of the matters or things in said bill of complaint contained to be true, doth demur thereto on the following grounds, to wit:
That the bill of complaint does not state such a case or fact sufficient to entitle the complainant to the discovery or the relief prayed, and therefore prays to be dismissed with costs.

R. & B., *Sol. for Wiggin.*

And thereupon, afterwards, to wit, on said 11th day of July, A. D. 1863, there was filed and entered on the journal in the office of the clerk of
31 said court an order made by the court, William P. Kellogg, judge, in said cause, overruling the said demurrer of defendant Wiggin; which said order was in the words and figures following, to wit:

At a district court in chancery, held at the city of Omaha for Douglas County, on the 11th day of July, 1863.

Present: Honorable W. P. Kellogg, judge.

JOHN R. PORTER *et ux.*
vs.
RICHARD WIGGIN IMPLEADED WITH JOHN A. HORBACH.

The demurrer of said Wiggins came on this day to be heard, and was argued by counsel; whereupon it is ordered that the same be and is overruled, and that said defendant answer to the merits of said bill within sixty days from the date hereof.

WM. P. KELLOGG, *Judge.*

And thereupon, afterwards, to wit, on the 22d day of July, A. D. 1863, interrogatories in said cause were filed in the office of the clerk of said court; which said interrogatories were in the words and figures following, to wit:

Interrogatories to be administered to Jonas Seely, a witness to be produced, sworn, and examined under and by virtue of the commission hereto annexed, issued out of the district court in chancery of the Territory of Nebraska, for the first judicial district and county of Douglas, in a certain
32 cause depending therein between John R. Porter and Jane M., his wife, complainants, and John A. Horbach and Richard Wiggin, defendants:

First interrogatory. What is your name, age, occupation, and place of residence?

Second interrogatory. Do you know the parties, any or either of them, in the title to these interrogatories named? If so, how long have you known them respectively, or such of them as you do know?

Third interrogatory. Where did you reside, and in the practice of what, if any, profession were you engaged from July 1st, 1856, to July 1st, 1861?

Fourth interrogatory. State whether or not you were ever employed by the said defendant John A. Horbach, to do any service or services for him. If so, when, where, what was the nature of such service or services, each and every thereof; and what, if any, services you rendered to the said Horbach under or by virtue of such employment?

Fifth interrogatory. State whether or not you were ever, by the said Horbach, paid for services so by you rendered to him at his said request, if any you did render. If you answer that you were paid, declare fully how, and when, and where, and by whom, and in whose presence, you were so paid.

Sixth interrogatory. State whether or not you do know who made
33 the bid at the public sale made by the register and receiver of the United States land office at Omaha, Nebraska, for the south half of the northeast quarter and the south half of the northwest quarter of section fifteen, in township 15 north, of range thirteen east of sixth principal meridian in said Territory, on the 15th day of December, 1860. If you do, state.

Seventh interrogatory. State, if you know, whether the person making such bid did so in trust for any other person or party. If so, who was the party or person for whom such bid was made? Declare fully your means of knowledge of the matter here inquired after.

Eighth interrogatory. State, if you know, whose money was paid for said lands at the aforesaid sale thereof. Declare fully your means of knowledge of the matter here inquired after.

Ninth interrogatory. Do you know at whose, if any person's, instance the sale of said lands, made by the aforesaid land officers, was vacated and set aside by the Commissioner of the General Land Office? If you do know, state and declare fully your means of information on that point.

Tenth interrogatory. If, in answer to the fifth above interrogatory, you state that you were paid for services rendered by you to said Horbach by the conveyance of lands to you, state what lands were conveyed to
34 you, and by whom, and at whose, if any person's, direction, and whether or not the same were conveyed to you upon or in pursuance of any contract or agreement made by you with any, and if so, what person or persons.

Eleventh interrogatory. If, in answer to the last above interrogatory, you say that lands were conveyed to you in pursuance of a contract or agreement made by you and in payment for services rendered by you to said Horbach, declare fully what that agreement was, and when, and where, and in whose presence, the same was made.

Twelfth interrogatory. If you state that lands were conveyed to you in payment or satisfaction for services rendered by you to the said Horbach, state whether or not you did accept and receive the same as and for a satisfaction and discharge of your demand against him for such services.

Thirteenth interrogatory. State whether or not you did ever sell to the complainants in the title to these interrogatories named any portion of the lands, if any, so received by you for said services. If so, state whether or not, at the time you were negotiating such sale, or at the time you conveyed said lands to said complainants, the said Horbach knew that you were so negotiating such sale or conveying said lands. If so, declare fully your means of knowledge of the fact.

35 Fourteenth interrogatory. Do you know, and if so, state, whether or not the aforesaid complainants were, before paying to you the consideration for said premises, advised that the said Horbach claimed any interest in said premises. Declare fully your means of knowledge.

Last interrogatory. If you know any other matter or thing touching the matters in controversy in this cause, set the same forth as fully as if the same were here repeated and you specially interrogated thereunto.

And thereupon, afterwards, to wit, on the 15th day of September, A. D. 1863, a commission to take depositions in said cause was issued out of and under the seal of said court; which said commission was in the words and figures following, to wit:

The district court of the first judicial district of the Territory of Nebraska, within and for the county of Douglas, in chancery.

The Territory of Nebraska, county of Douglas, to Geo. Maderia, justice of the peace for Omsby Co., N. T., greeting:

Know you that we, having full faith in your prudence and competency, have appointed you commissioner, and by these presents do authorize and require you to examine upon interrogatories annexed to this commis-
36 sion, Jonas Seely, esquire, of Carson City, in Nevada, in a certain cause pending in this court, wherein John R. Porter, Jane M., complainants, plaintiffs, and John A. Horbach and Richard Wiggin, defendants, on oath, to be by you administered, to take and certify the depositions of the said witnesses, and return the same in accordance with the statute in such case made and provided.

Witness the hon. judge of the district court of the first judicial district, at the city of Omaha, on the fifteenth day of September, A. D. 1863.

[SEAL.] JOHN H. KELLOM, *Clerk*,
By H. M. DICKINSON, *Dept. Clk.*

And thereupon, afterwards, to wit, on the 20th day of November, A. D. 1863, there was filed in the office of the clerk of said court the deposition of Jonas Seely, a witness on behalf of said complainants, which said deposition was in the words and figures following, to wit:

TERRITORY OF NEBRASKA:

The district court of the 1st judicial district, within and for the county of Douglas, in chancery.

JOHN R. PORTER AND JANE M. PORTER, complainants,
vs.
JOHN A. HORBACH AND RICHARD WIGGIN, defendants.

Deposition of Jonas Seely, a witness produced, sworn, and examined on behalf of the complainants named in the annexed commission, and under and by virtue thereof.

37 Jonas Seely, being sworn, as hereinafter certified, answering:

To the 1st interrogatory he saith: My name is Jonas Seely; I am thirty years old; am a practicing lawyer, and reside at Carson City, in the Territory of Nevada.

To the 2d interrogatory he saith: I have known the complainants and defendant Horbach about seven years. I do not know defendant Wiggin.

To the 3d interrogatory he saith: I reside in Omaha, Nebraska, and was engaged in the practice of law from July 1st, A. D. 1856, to May 1st, 1861.

To the 4th interrogatory he saith: I was employed by defendant John A. Horbach as his attorney in obtaining and defending his title and claim to the land mentioned hereafter in this deposition. My employment commenced in 1857, and continued until the first part of the year 1861, and under it I acted as his attorney at Omaha in defending his title and claim to said land before the land office, giving advice in regard to the same, preparing and supervising the preparation of papers, affidavits, &c., touching the same matters.

To the 5th interrogatory he saith: I was paid for the services I rendered Mr. Horbach by the conveyance of ten acres of land, made by deed
38 executed by Josiah S. McCormick to me, on or about the 15th day of December, A. D. 1860, at Omaha. This deed was filled out by myself, in my office, in Omaha, on the day of its date, in the presence of Mr. A. J. Hanscom and J. A. Horbach, and taken by Mr. Horbach to McCormick to be executed, and when it was executed Horbach delivered it to me.

To thd 6th interrogatory he saith: Mr. Josiah S. McCormick made that bid, and it was made under my advice and direction given to Mr. Horbach.

To the 7th interrogatory he saith: Mr. McCormick bid off that land in trust for Mr. John A. Horbach. I know this from the statements made to me both by Mr. McCormick and Mr. Horbach, and from the fact that I advised Mr. Horbach to have the matter so done.

To the 8th interrogatory he saith: I know the money was furnished by John A. Horbach; at least, he told me so.

To the 9th interrogatory he saith: I have been informed that said sale had been vacated. I had frequently and constantly advised Mr. Horbach that his title to said land obtained by pre-emption was valid, and if he continued to prosecute his claim under it it must be sustained eventually. He as frequently and constantly promised to follow my advice, and from these
39 facts I infer that the sale was vacated at Horbach's request.

To the 10th interrogatory he saith: The lands conveyed to me were ten acres. A square piece taken from the northwest corner of said tract of land described in interrogatory No. 6, deeded by McCormick, as before stated, under the direction of Mr. Horbach and in pursuance of an agreement made between said Horbach and myself.

To the 11th interrogatory he saith: The land was conveyed to me in pursuance of an agreement made by Horbach and myself at Omaha a few days before the 15th day of December, 1860, in the presence of Mr. Hanscom, and

repeated to Mr. Jesse Lowe. The agreement was that Mr. Horbach should give, and cause to be conveyed by a perfect title to me, said lands—the ten acres—which was to be given and received in full payment of services rendered him by me before that time and to be rendered by myself and Mr. Hanscom at said land sale.

To the 12th interrogatory he saith: I did receive said conveyance of said ten acres of land in satisfaction, payment, and full discharge of my demand against said Horbach, with the further understanding between him and myself that if he finally failed to establish or procure any title to said land, that he would pay me $1,000 in money.

40 To the 13th interrogatory he saith: At the time I was negotiating for the sale of one half of the lands so conveyed to me by McCormick to the complainants, I did advise Mr. Horbach of such negotiation, and told him that in case any enquiries were made in regard to the title to state, as his and my agreement was, that in any event my title to said land should be made perfect.

To the 14th interrogatory he saith: I am entirely confident that, at the time I sold said ground to the complainants, the complainants had no knowledge or intimation that said Horbach claimed any interest in said land; but, on the contrary, that he claimed no interest in it except to perfect my title. They had every assurance, both from myself and, as I believe, from Horbach himself.

To the last interrogatory he saith: My agreement with Horbach was that if my title failed under McCormick, and his pre-emption was sustained, he would cause a new conveyance to be made to me perfecting my title. If the pre-emption title and McCormick's title both failed and he obtained title otherwise, he would perfect my title. If he failed to get title at all, he was to give me $1,000 in money.

JONAS SEELY.

41 TERRITORY OF NEVADA, *County of Omsby, ss:*

I, George Maderia, a justice of the peace, in and for said county, residing at Carson City, do hereby certify that I did first swear the aforementioned Jonas Seely to testify the truth, the whole truth, and nothing but the truth, in answer to the interrogatories hereto annexed, and that in answer to them and each of them, he testified in the manner above mentioned; that his said deposition was reduced to writing by him in my presence, and was by him in my presence, *and in my presence*, subscribed *by him;* and that said deposition was taken at Carson City, in said county and Territory, on the 26th day of October, A. D. 1863.

Witness my hand, at Carson City, in said county and Territory, this 26th day of October, A. D. 1863.

GEO. MADERIA,
Justice of the Peace, Omsby County, N. T.

TERRITORY OF NEVADA, *County of Omsby, ss:*

I, Alfred Helm, clerk of the district court, second judicial district, in and for said Territory, do hereby certify that George Maderia, esq., whose name *name* is attached to the foregoing certificate, is, and was at the time of executing the same, an acting justice of the peace in and for said
42 county, duly commissioned and sworn, and his signature to said instrument is genuine, and due faith and credit is due to his official acts as such. I further certify that the foregoing instrument is executed in accordance with the laws of said Territory.

In testimony whereof, I have hereunto set my hand and the seal of said district court this 26th day of October, A. D. 1863.

[SEAL.] ALFRED HELM, *Clerk.*

On the 10th day of September, A. D. 1863, there was filed in the office of the clerk of said court, the answer of defendant Wiggin to said bill of complaint; which said answer was in the words and figures following, to wit:

In chancery, in the district court, Douglas County, Nebraska Territory.

The separate answer of Richard Wiggin, one of the respondents, to the bill of complaint exhibited in this court by John R. Porter and Jane M., his wife, against this defendant and John A. Horbach.

This respondent, now and at all times hereafter saving and reserving unto himself all and all manner of advantage by exception and otherwise to the many errors and imperfections in said bill contained, for answer thereunto, or to so much thereof as he is advised is important or necessary for
43 · him to make answer unto, answering, saith, he denies each and every allegation and statement in said bill contained, except such of said allegations as are by this answer expressly and in so many words admitted. This respondent is informed, and believes it to be true, that the said John A. Horbach did settle upon and improve the land in said bill described, under the pre-emption act of 1841, and on the 21st day of November, 1857, proved, to the satisfachion of the register and receiver of the Omaha land district, that he had so settled upon and improved said land, as is required by the said act, entitled "An act to appropriate the proceeds of the sales of the public lands, and to grant pre-emption rights," approved September 4th, 1841, and about that time and under said act aforesaid, did enter the said land with the said register, and thereupon that officer did make, execute, and deliver to him, the said Horbach, the usual patent certificate for said lands, as in said bill of complaint charged and set forth.

This respondent, further answering, saith, he is informed, and believes it to be true, that on the day aforesaid, and from thence unto the present time, the said Horbach has continued to be in the occupancy and possession of said premises, cultivating, improving, and inhabiting the same, as in said bill charged and set forth.

44 This respondent, further answering, saith, as to whether the said entry by said Horbach made was ever canceled and declared void by the proper officer of the land department of the government, as in said bill set forth, this respondent has no knowledge, information, or belief, except as appears in said bill, and therefore denies the allegation of the bill in that regard, and asks that the complainant be put upon his proof.

This respondent further saith, he has no knowledge whatever of the letter referred to in said bill of complaint, dated about the first day of November, 1860, addressed to the register and receiver of the Omaha land district, ordering the said entry by the said Horbach made, to be canceled upon the books of their office, and the said land by him entered restored to the body of the public lands, except as stated in said bill of complaint; and therefore denies all the allegations in that regard, and asks that the complainant be put to his proofs.

This respondent, further answering, saith, he has no knowledge, information, or belief as to whether said lands so entered by the said Horbach were ever sold at public auction under the direction of the said Commissioner, or whether any notice of said sale was given of any kind, or whether the said Horbach employed one Josiah S. McCormick to attend said sale as a bidder ostensibly in his own name, but in fact on behalf of the said Horbach, as in said bill set forth, or whether said Horbach furnished to said McCormick any sum of money whatever with which to make payment for the said
45 lands, as in said bill alleged, except as stated in said bill of complaint; and therefore denies all the allegations of the bill in that behalf, and

asks that the complainant be compelled to prove the same and all the statements of the bill in relation thereto.

Respondent, further answering, saith, he has no knowledge, information, or belief as to whether the said John A. Horbach was at the time mentioned, or at any time, indebted to Jonas Seely in any sum whatever, for professional services or otherwise, except as stated in said bill of complaint; and therefore this respondent denies the allegations in that behalf, and asks that the complainant be put upon his proofs.

Respondent, further answering, saith, he has no knowledge, information, or belief as to whether the said Josiah S. McCormick ever conveyed, by deed or otherwise, said premises, or any portion of them, to the said Jonas Seely by the direction of the said Horbach, or in any other way, or that the said Horbach made any representations to the said Seely, or that he offered to deliver the said deed of conveyance, by the said McCormick made, to the said Jonas Seely, except as stated in said bill of complaint, and therefore denies the same, and asks that the complainant be put to his proof in that regard.

46 This respondent, further answering, saith, he has no knowledge, information, or belief as to whether the said John A. Horbach made any representations to the said Seely to induce him to accept the said deed last aforesaid, or whether he promised and agreed to and with the said Seely that he would forever warrant and defend the title to the said lands to him conveyed by the said McCormick as aforesaid, except as stated in the said bill of complaint; and he therefore denies each and every allegation of said bill in that regard, and asks that the complainant be put to his proofs.

This respondent, further answering, saith, he has been informed by his counsel lately, and long since his purchase of said premises of the said Horbach, that one Mr. Porter and a Mr. Brown claimed to own the premises herein last described; but this respondent does not know and has no information as to what title they claim under, or as to whether the said Horbach had any knowledge of the negotiation or sale of said premises, or any portion thereof, by said Seely to complainant, or that the said Horbach concealed the fact from said complainant during the negotiation, except as stated in the said bill of complaint, and therefore denies each and every allegation in that behalf, and asks that the complainant be put upon his proofs.

47 This respondent, further answering, saith, he has no knowledge, information, or belief as to whether the said complainant ever occupied and improved said premises, and with the knowledge of the said Horbach improved the same to the amount of about one hundred and fifty dollars, and therefore denies the allegations of the bill in that regard, and asks that the complainant be put to his proofs; but this respondent denies positively the allegations of the bill that the complainant was ignorant of the claim of the said Horbach at the time of his purchase from said Jonas Seely.

This respondent, further answering, saith, he has no knowledge as to the manner in which the said Horbach obtained his letters patent to the said land, but admits that the letters patent were issued to the said John A. Horbach at the time mentioned in said bill of complaint; nor has this respondent any knowledge whatever in regard to the government refunding the money so paid for said land by said McCormick, except as in said bill set forth, and therefore denies each and every allegation in that behalf.

This respondent, further answering, saith, he denies the allegations in said bill of complaint that the complainant was totally and wholly ignorant of the proceedings that were being had to restore to the said Horbach

48 his original pre-emption entry; but respondent is informed and believes that the complainant was fully advised of the rights of said Horbach at the time of his purchase of said Jonas Seely, and of all the proceedings, to maintain his said entry, and this respondent most distinctly denies that said proceedings were carried on secretly or in any way concealed from complainant, as in said bill set forth, but says he was well and perfectly posted on all the proceedings in relation thereto.

This respondent, further answering, saith, on the 23rd day of April, 1862, the said Horbach, together with Sallie, his wife, by their deed of conveyance, bearing date on said day, sold and conveyed said last-mentioned premises to this respondent, and the said Horbach by said deed covenanted with this respondent that he was well seized of said premises, and had a good and perfect title to the same, free of all and every incumbrance, and that he would hereafter defend said premises against the lawful claims of all persons whomsoever; and further says that the said deed last aforesaid was duly recorded in the office of the register of deeds of Douglas County, as in said bill charged and set forth. But this respondent denies particularly the

49 allegation in said bill of complaint that at the time of the making of said deed by the said Horbach to this respondent that this respondent had due notice or any notice whatever of the equities or claims of the complainants, if any he has, as charged and set forth in said bill of complaint; but this respondent alleges the truth to be that he purchased said premises of the said Horbach in person, and in the most perfect good faith, and paid therefor a full and adequate consideration, and at the time of said purchase and for a long time thereafter had no notice, intimation, or surmise that the complainant or any one else had any equity or claim of any kind or nature to the said premises, but bought the same as aforesaid after being shown by said Horbach the letters-patent to the tract of land hereinbefore described, including the land in dispute; and therefore this respondent denies in so many words every allegation in said bill set forth charging this respondent in any way with notice of the equities of the said complainant at the time of his purchase of said premises of the said Horbach, if any he had or has.

This respondent, further answering, saith, he is informed and believes, and therefore charges the truth to be, that from the date of said Horbach's entry of said premises to the present time the only occupant has been the said John A. Horbach; and this respondent alleges and charges the truth to be that the said complainant never resided upon or occupied said premises as charged in said bill, but says, at the time of the said entry by Horbach of said premises, and until the present time, there has been no occupant of

50 said premises except said Horbach or tenants under him; that the said premises in dispute were at the time of the purchase by respondent, and are at this time, vacant land.

This respondent denies all and all manner of unlawful combination and confederacy, wherewith he is in said bill charged, without that any other matter or thing by this answer not fully answered, avoided, traversed, or denied, is true.

All of which matters and things this respondent is and will be ready and willing to aver, maintain, and prove, as this honorable court shall direct, and asks to be hence dismissed with costs.

REDICK & BRIGGS, *Sol. for Wiggin.*

STATE OF PENNSYLVANIA, *Alleghany County, ss*:

Richard Wiggin, being duly sworn, deposes and says he is one of the respondents in this action; that he has heard the foregoing answer read, and

knows the contents thereof, and that the same is true of his own personal knowledge, except as to those matters therein stated on information and belief, and as to those matters he believes it to be true.

R. WIGGIN.

Subscribed in my presence and sworn to before me this 28th day of August, A. D. 1863.

[SEAL.] H. E. DAVIS, *Notary Public.*

ALLEGHANY COUNTY, *State of Pennsylvania, ss:*

I, Henry Eaton, prothonotary of the court of common pleas in and
51 for the county of Allegheny, in the commonwealth of Pennsylvania, the same being a court of law and record, do by these presents certify that H. E. Davis, esquire, before whom the foregoing answer was taken, and who has thereunto in his own proper handwriting subscribed his name, was at that time and now is a notary public in and for the said county, duly commissioned and sworn, and authorized by law to take acknowledgments, administer oaths, &c., to all whose acts as such due faith and credit are, and of right ought to be, given throughout the United States and elsewhere.

In testimony whereof, I have hereunto set my hand and affixed the seal of the said court, at Pittsburg, in the said county, this 28th day of August, in the year of our Lord one thousand eight hundred and sixty-three, and of the sovereignty and independence of the United States of America the eighty-eight.

[SEAL.] HENRY EATON, *Prothonotary.*

On the 18th day of September, A. D. 1863, interrogatories in said cause were filed in the office of the clerk of said court; which said interrogatories were in the words and figures following, to wit:

Interrogatories to be administered to Richard Wiggin, of Allegheny City, in the State of Pennsylvania, a witness to be produced, sworn, and examined in a certain action now pending in the district court of the 1st judicial district of the Territory of Nebraska, sitting within and for
52 the county of Douglas, in chancery, wherein John R. Porter and wife are complainants, and John A. Horbach and Richard Wiggin are defendants, under a commission issued out of said court, directed to George Kelly, of Allegheny City, a commission on the part of said defendants.

First interrogatory. What is your name, age, occupation, and place of residence?

Second interrogatory. Do you know the parties, complainants and defendants, in the title to be these interrogatories named, or any or either of them and which of them, and for how long have you known, respectively? Declare fully.

Third interrogatory. State whether you ever purchased any land of said John A. Horbach; and if so, state where the land was situated, and a description thereof; and also state when you purchased the same, and whether or not you paid any consideration; and if you did, state to whom you paid it, when, and what was the amount of the same, and whether such consideration was money or property. Declare fully.

Fourth interrogatory. Did you ever see the premises in question? and if so, when?

Fifth interrogatory. State, at the time of your purchase of said premises of said Horbach, what knowledge you had, if any, that there were incumbrances on the same, or persons claiming title to said premises other than said Horbach, and also state whether you had or saw any evidences of said
53 Horbach's title; and if so, state what it was. Declare the truth fully.

Lastly. Do you know or can you set forth any other matter or thing which may tend to the benefit of either of the parties, or material to the subject of this examination? If so, set the same forth, with all the circumstances, according to the best of your knowledge.

REDICK & BRIGGS,
Solicitors for Defendants.

And thereupon, afterwards, to wit, on the 1st day of October, A. D. 1863, there issued out of and under the seal of said court a commission to take depositions in said cause; which said commission was in the words and figures following to wit:

The district court of the first judicial district of the Territory of Nebraska, within and for the county of Douglas, in chancery, to George Kelley, esq., of Allegheny City, Pennsylvania, greeting:

Know you that we, having full faith in your prudence and competency, have appointed you commissioner, and by these presents do authorize and require you to examine, upon interrogatories annexed to this commission, Richard Wiggin, of Allegheny City, Pennsylvania, in a certain cause pending in this court, wherein John R. Porter and wife are complainants and John A Horbach and Richard Wiggin are defendants, on oath, to be by you administered, to take and certify the depositions of the said witness, and
54 return the same in accordance with the statute in such case made and provided.

Witness the Hon. Wm. Kellogg, judge of the district court of the first judicial district, at the city of Omaha, on the 1st day of October, A. D. 1863.
[SEAL.] JOHN H. KELLOM, *Clerk*,
By H. W. DICKINSON, *Dept. Cl'k.*

And thereupon, afterwards, to wit, on the 16th day of November, A. D. 1836, there was filed in the office of the clerk of said court the deposition of Richard Wiggin, a witness in behalf of defendants in said cause; which said deposition was in the words and figures following, to wit:

Deposition of Richard Wiggin, of Allegheny City, in the State of Pennsylvania, a witness sworn and examined in a certain action now pending in the district court of the 1st judicial district of the Territory of Nebraska, sitting within and for the county of Douglas, in chancery, wherein John R. Porter and wife are complainant and John A. Horbach and Richard Wiggin are defendants, under a commission issued out of said court, directed to George Kelley, of Allegheny City, a commissioner on the part of said defendants, as appears by the commission and hereto attached; said deposition taken by me at my office this 24 day of October, A. D. 1863, as hereinafter duly certified.

Richard Wiggin, of Allegheny City, Allegheny County, State of Pennsylvania, of lawful age, being first duly sworn by me, as hereinafter
55 certified, deposes as follows:

First interrogatory. What is your name, age, occupation, and place of residence?

Answer. My name is Richard Wiggin; age, thirty-nine years; occupation passenger conductor on Pittsburg, Fort Wayne, and Chicago Railway Company; residence, Allegheny City, Allegheny County, State of Pennsylvania.

Second interrogatory. Do you know the parties, complainants and defendants, in the title to these interrogatories named, or any or either of them, and which of them, and for how long have you known them, respectively? Declae fully.

Answer. Don't know either of the complainants; have known John A. Horbach for nine years.

Third interrogatory. State whether you ever purchased any land of said John A. Horbach; and if so, state where the land was situated, and a description thereof, and also state when you purchased the same, and whether or not you paid any consideration; and if you did, state to whom you paid it, when, and what was the amount of the same, and whether such consideration was money or property. Declare fully.

Answer. I did purchase land of said John A. Horbach; said land situated in Omaha City, Douglas County, Nebraska Territory, and is ten acres off of the northwest corner of the one hundred and sixty acres pre-empted by
56 said John A. Horbach. I purchased said land on the 14th day of April, A. D. 1862. I paid a consideration to said John A. Horbach of four hundred dollars ($400) for said land, in the following manner: upon receipt of the deed I sent said John A. Horbach by mail a draft on New York City for one hundred dollars ($100) and my notes as follows, viz: one note for one hundred dollars, payable first day of June, A. D. eighteen hundred and sixty-two, and one note for two hundred dollars, payable on November, fifteenth day, A. D. eighteen hundred and sixty-two. Said notes were paid at maturity, in cash, to said John A. Horbach.

Fourth interrogatory. Did you ever see the premises in question? and if so, when?

Answer. I was on the premises in the spring of A. D. eighteen hundred and fifty-six, (1856.)

Fifth interrogatory. State at the time of your purchase of said premises of said John A. Horbach, what knowledge you had, if any, that there were incumbrances on the same or persons claiming title to said premises other than said Horbach, and also state whether you had or saw any evidence of said Horbach's title, and if so, what it was. Declare fully.

Answer. I had no knowledge whatever of any incumbrances on said land or premises, and had no knowledge of any person or persons claiming title to said premises other than said John A. Horbach, to the best of my
57 knowledge and belief. I saw the patent granted to said John A. Horbach from United States government.

Last interrogatory. Do you know or can you set forth any other matter or thing which may be told to the benefit of either of the parties, or material to the subject of the examination? If so, set the same forth, with all the circumstances, according to the best of your knowledge.

Answer. I do not know of any matter or thing more that would tend to the benefit of either of the parties the subject of this examination.

RICHARD WIGGIN.

STATE OF PENNSYLVANIA, *City of Allegheny, ss:*

Be it known that I, George Kelley, of the city of Allegheny, county of Allegheny and State aforesaid, commissioner in the attached commission named, do hereby certify that the above-named Richard Wiggin was by me, on this 24th day of October, A. D. 1863, at my office, in said city, duly sworn to testify the truth, the whole truth, and nothing but the truth, before answering the aforesaid interrogatories; that the foregoing deposition, by him subscribed in his own proper handwriting, was reduced to writing by me, and by said witness duly subscribed in my presence, and taken as aforesaid at the time and place herein named.

58 Witness my hand and seal, at the city of Allegheny, this 24th day of October, A. D. 1863, as aforesaid.

[SEAL.] GEORGE KELLEY.

And on the 26th day of September, A. D. 1863, the said complainants filed in the office of the clerk of said court their replication to the answers of defendant Wiggin; which said replication was in the words and figures following, to wit:

In chancery.

The replication of John R. Porter and Jane M., his wife, complainants, to the answer of Richard Wiggin, one of the defendants, to the bill of said complainants.

These repliants, saving all benefit of exception which may be had or taken to the said answer, for replication thereunto say they will aver, maintain, and prove their said bill to be true, certain, and sufficient *and sufficient* in the law to be answered unto, and that the said answer is untrue, uncertain, and insufficient to be replied unto, without this, that any other matter or thing in the said answer contained not herein and hereby well and sufficiently replied unto, confessed and avoided, traversed or denied, is true. All which matters and things these repliants are and will be ready to aver, maintain, and prove as this honorable court shall direct, and humbly pray as in and by their said bill they have already prayed.

JAMES M. WOOLWORTH, *Sol. for Compl'ts.*

And afterwards, to wit, on the 21st day of October, A. D. 1863, there was filed in the office of the clerk and register of said court, an order of reference made by said court, John H. Kellom, reg., in said cause;
59 which said order was in the words and figures following, to wit:

District court, in chancery, Douglas County, Omaha, October 20th, 1863. Before John H. Kellom, register.

JOHN R. PORTER *et ux.*
vs.
JOHN A. HORBACH *et al.*

On motion of James M. Woolworth, solicitor for the complainant, it is ordered that it be referred to D. Gantt, one of the masters of this court, to hear, take, and report the testimony of the parties to this cause.

[SEAL.] JOHN H. KELLOM, *Clerk.*

And thereupon, afterwards, to wit, on the 12th day of November, 1863, the defendant Horbach having failed to answer the bill in this cause, it is ordered, said bill be, and is hereby, taken as confessed against him. And thereupon, afterwards, to wit, on the 12th day of November, A. D. 1863, the said defendant Horbach filed the affidavit of Clinton Briggs in said cause; which said affidavit was in the words and figures following, to wit:

Douglas County, in chancery.

JOHN R. PORTER AND WIFE, complainants,
vs.
JOHN A. HORBACH AND RICHARD WIGGIN, defendants.

TERRITORY OF NEBRASKA, *Douglas County, ss:*

Clinton Briggs, being by me first duly sworn, deposes and says that he is one of the solicitors for said defendants; that at the time said Horbach was required to answer the bill of complaint, he was confined to his bed with a dangerous illness, which rendered said Horbach wholly unable to attend to any kind of business until within the past few weeks,
60 and this is the reason why said Horbach did not file his answer when required by the order of this court; that said Horbach has a good

and meritorious defence to a portion of the matters of said bill, and is now able to set up said defence by answer. Said defendant Horback therefore asks that the default entered against him may be set aside, and he permitted to file his answer at such time as the court shall direct.

CLINTON BRIGGS.

Subscribed in my presence and sworn to before me this 12th day of November, 1863.

JOHN H. KELLOM, *Clerk.*

And thereupon, afterwards, to wit, on the 7th day of April, A. D. 1864, the motion of defendant Horbach to open the default taken against him and for leave to answer came on to be heard, and was argued by counsel; whereupon it is ordered, said motion be, and is hereby overruled.

And thereupon, afterwards, to wit, on the 11th day of April, 1864, the said defendant filed in the office of the clerk of said court a motion in said cause to suppress a deposition; which said motion was in the words and figures following, to wit:

District court, Douglas County, in chancery.

JOHN R. PORTER AND WIFE, complainants,
vs.
JOHN A. HORBACH AND RICHARD WIGGIN, defendants.

And now came said defendants and pray the court to suppress the deposition of the witness Andrew J. Hanscom taken in this cause, on the part of said complainants, on the ground that it appears from the testimony
61 of said Hanscom, and other testimony in the case, that he, Hanscom, derived all the facts to which he testified in the relation of an attorney for said Horbach, and that said Hanscom had no right to divulge the matters communicated to him in the confidential relation of attorney and client.

REDICK & BRIGGS, *Sol's for Defendants.*

And thereupon, to wit, on said 11th day of April, A. D. 1864, the said defendant Richard Wiggin filed in the office of the clerk of said court his supplemental answer to said bill of complaint; which said supplemental answer was in the words and figures following, to wit:

In chancery, in the district court, Douglas County, Nebraska Territory.

JOHN R. PORTER AND WIFE
vs.
JOHN A. HORBACH *et al.*

The supplemental answer of Richard Wiggin, one of the defendants in this cause, to the bill of complaint of John R. Porter and Jane M. Porter.

This defendant further shows unto your hon., by way of supplement to this defendant's original answer filed in this cause, that there was only about thirty days' notice given of the sale of the lands under the special sale mentioned in said complainant's bill set forth, when the instructions of the land department at Washington to the register and receiver of the Omaha land district required a notice of 60 days to be given before the sale should take place, but that said notice was not given and in violation
62 of said instructions and the laws of the United States, said sale took place; that the day before said sale took place a large number of

the prominent citizens of Omaha, Neb., entered into a secret arrangement and combination for the purpose of preventing a fair sale, and defrauding the United States, by which it was planned, agreed, and arranged by and between said citizens that one of the number should bid off a part of the lands offered at such sale at one dollar and twenty-five cents per acre, and that another of said citizens should bid off the remainder of said lands at the same price, and that they would be protected in bidding off the same by force, according to said arrangement, and that if any other person should bid or attempt to bid against them, such person should be forcibly removed from the said land office, so as to prevent him from bidding against said citizens. That at the hour when said sale was ordered to take place said citizens assembled in large numbers at said land office of the United States, for the purpose of carrying into effect the aforesaid unlawful arrangement, many of them armed with deadly weapons, and threatened to use the most extreme violence on the person of any one who should even attempt to bid on said lands against the citizens aforesaid; that said lands were worth at least fifty dollars per acre, and many persons desired to bid on the same, but were prevented from doing so by force, threats, and intimidation of said citizens, and in consequence said lands were sold for the sum of five dollars per acre or less, and in consideration of said facts the land department
63 at Washington vacated said sale, and held the same for nought. All of which matters and things defendant stands ready to aver and prove as the hon. court shall direct.

REDICK & BRIGGS, *Solicitors for Defendants.*

TERRITORY OF NEBRASKA, *Douglas County, ss:*

John J. Redick, being first duly sworn, deposes and says: I am one of the counsel for the defendants in the above-entitled cause that the defendant Wiggin is a non-resident of this Territory and absent at this time; that this affiant has heard the foregoing supplement to the original answer read, and knows the contents thereof, and the facts therein are true, as he verily believes.

JOHN J. REDICK.

Subscribed in my presence and sworn to before me this 11th day of April, A. D. 1864.

[SEAL.]

DAN. GANTT,
Notary Public for Douglas County, N. T.

And thereupon, afterwards, to wit, on said 11th day of April, A. D. 1864, the said complainants filed in the office of the clerk of said court their replication to said suppemental answer of defendant Wiggin; which said replication was in the words and figures following, to wit:

In chancery.

The replication of John R. Porter and Jane M., his wife, to the supplemental answer of Richard Wiggin, defendant.

These replicants, now and at all times hereafter saving to themselves all right of exception to said supplemental answer, for replication thereto, say, their bill of complaint is true, certain, and sufficient in law to be answered unto, and said supplemental answer is untrue, uncertain, and insufficient in law to be replied unto, without that any other matter or thing in said
64 answer contained, not herein and hereby well and sufficiently replied unto, confessed and avoided, traversed or denied, is true, to the knowledge or belief of this defendant. All of which matters and things these repliants will aver, maintain, and prove as this honorable court shall direct, and pray as in and by their said bill they have already prayed.

JAS. M. WOOLWORTH, *Sol. for Complain't.*

And thereupon, afterwards, to wit, on the 13th day of April, A. D. 1864, depositions, taken on part of said complainants, were filed in the office of the clerk of said court; which said depositions, respectively, were in the following words and figures, to wit:

Depositions of witnesses taken in a certain cause pending in the district court of Douglas County, Nebraska Territory, in chancery, wherein John R. Porter and Jane M. Porter, his wife, are complainants and John A. Horbach *et al.* are defendants, in pursuance of an order of reference made by said court and directed to the undersigned master in chancery, bearing date the day of , A. D. 1863, and taken upon notice.

OCTOBER 27TH, 1863.

The following examinations had at my office in Omaha, Douglas County; J. M. Woolworth appears as sol. for complainants; Redick & Briggs appear as sol. for defendants.

Augustus Macon, a witness produced, sworn, and examined on part of complainants, says:

65 Int. 1. Do you know the parties to this suit, or any or either of them? If so, how long have you known them or such of them as you do know?

Ans. I know the complainants and defendant John A. Horbach, and have known them about six years.

Int. 2d. State, if you know, for whom, if for any other persons than himself, J. S. McCormick purchased the lands near this city, pre-empted by said Horbach, at the time the land were sold at public auction by the United States. If so, for whom, and what are your means of knowledge?

(Objected to by def't, on the ground that, 1st, it is immateral and irrelevant; 2d, leading; and 3d it does not appear that the defendant Wiggin had any knowledge of that transaction.)

Ans. J. S. McCormick purchased them for J. A. Horbach. My means of knowledge is this: Horbach, I think, the day of sale or immediately after the sale, in the winter of 1860 or 1861, came into my office and told me—(here def't objects to anything that Horbach may have said in regard to this matter, unless it shall first appear that the other defendant, Wiggin, was present.)

Witness proceeds: that J. S. McCormick had bid the land in at public sale for him and paid for it with his money, he said.

Cross-examination.

Int. 1st. Who was present besides yourself at that conversation? Where and when was it? Fix the place, day, month, and year.

Ans. John A. Horbach was present, and no one else, in my office.

66 As near as I can fix the time, it was December, 1860.

Int. 2d. Where was your office kept at that time?

Ans. It was kept above Tootle's store, in front of the building, up-stairs, in the east room.

AUGUSTUS MACON.

Andrew J. Hanscom, a witness produced, sworn, and examined on part of complainants, says:

Int. 1st. What is your place of residence, how long have you there resided, and in what business have you been engaged during the time?

Ans. Place of residence is city of Omaha, and have resided here since the fall of 1854. I have been engaged part of the time in practicing law, part of the time in farming, and latterly in selling goods.

Int. 2d. Do you know the parties to this suit, or any or either of them?

If so, how long have you known them, respectively, or such of them as you do know?

Ans. I know Mr. Porter and Mr. Horbach; Mr. Porter since 1856, and Horbach since 1856 or 1857. I know Mrs. Porter since 1856, but do not know Wiggin.

Int. 3d. State whether or not you were acquainted with the south ½ of the northwest quarter and the south ½ of the northeast quarter of section fifteen, township fifteen north, range thirteen east of the sixth principal meridian, being the premises near this city pre-empted by the defendant Horbach. If so, how long have you known them?

(Objected to by def't as leading and immateral—last part of question.)

67 Ans. I am acquainted with the land described as pre-empted by John A. Horbach, and have been since I came to the Territory.

Int. 4th. State, if you know, whether or not the said premises were ever sold by the United States. If so, when, to whom, by whom, where, in what manner, and for what sum?

(Objected to by def't, on the ground, 1st, that the question is leading; 2d, is immaterial and irrelevant and not the best evidence.)

Ans. They were so sold, I think, in December, 1860; it was during the winter of 1860 and 1861, I think in December; were sold to J. S. McCormick; were sold by John A. Parker, register of the land office; were sold in city of Omaha, Nebraska, at the land office, at public sale, at auction; for what sum I am now unable to tell.

Int. 5th. State, if you know, whether the said McCormick bid in said premises for himself or for any other person. If for any other person, declare for whom, and your means of knowledge.

(Objected to by def't, 1st, it is leading; 2d, immaterial and irrelevant; and 3d, it does not appear that the defendant Wiggin had any knowledge of this matter; and 4th, if it shall appear hereafter that the witness was acting in any manner as attorney for the defendant Horbach in procuring title to this land, I do object, on the ground that he obtained his information in confidence, and has no right to disclose it.)

Ans. He did not bid it in for himself, but bid it in for John A. Horbach. I was so informed by Mr. Horbach, and also heard both Messrs. Hor-

68 bach and McCormick speak in relation to it.

Int. 6th. When were you so informed by Horbach, and when did you hear Horbach and McCormick speak in relation to it?

(Objected to by def't, 1st, it is leading; 2d, immaterial and irrelevant; 3d, it does not appear that the def't Wiggin had any knowledge of this matter; 4th, if it shall appear hereafter that the witness was acting in any manner for def't Horbach in procuring title to this land, I do object, on the ground that he obtained his information in confidence, and has no right to disclose it.)

Ans. Previous to the sale Mr. Horbach told me if it was necessary to do so, he would have McCormick to bid it off for him; and after the sale, at Jonas Seely's office, on the same day of the sale, I think, Horbach said that McCormick bid it off for him, and would deed the land in question as he had agreed to; and McCormick did make a deed to Seely, under the direction of Horbach, in accordance with Horbach's agreement. On the same day, after the sale, I heard Horbach and McCormick, at Seely's office, talk in relation to it, together with Seely and myself.

(Here def't objected to the answer given, upon the further ground that it is not responsive to the question.)

Int. 7. State fully what was said at the time mentioned by you in your answer to the last above interrogatory, by the respective parties

69 present at the same.

(Objected to by def't, 1st, as immaterial and irrelevant; 2d, it does

not appear that the def't Wiggin had any knowledge of this matter; 3d, if it shall appear hereafter that the witness was acting in any manner for def't Horbach in procuring title to this land, I do object, on the ground that he obtained his information in confidence, and has no right to reveal it.)

Ans. I don't know that I am able to state fully all that was said; but the manner in which the land was bid off, and for whom it was bid off, was talked over by McCormick, Horbach, Seely, and myself.

(Here def't objects to anything that was said by Seely.)

Witness proceeds——

Int. 8th. Do you know, and if so, state, what was the nature of the consideration for the deed made by McCormick to Seely?

(Objected to by def't, 1st, as immaterial, irrelevant, 2d, it does not appear that the def't Wiggin had any knowledge of this matter; 3d, if it shall appear hereafter that the witness was acting in any manner for def't Horbach in procuring title to this land, I do object, on the ground that he obtained his information in confidence, and no right to reveal or disclose it.)

Ans. I do know; it was in consideration for services rendered by Mr. Seely, together with my assistance, in procuring or assisting to procure the title to said for said Horbach.

70 Int. 9. Do you know, and if so, state, whether or not, at the time you have already mentioned, any promises were made by said Horbach to said Seely relative to making good the title of the premises conveyed by McCormick to Seely, in case the McCormick purchase should be set aside or vacated? If so, what were the same, and what was said by yourself or any other person in that regard, at that time?

(Objected to by def't, 1st, leading; 2d, immaterial and irrelevant; 3d, it does not appear that the def't Wiggin had any knowledge of this matter; 4th, if it shall appear hereafter that the witness was acting in any manner for def't Horbach in procuring title to this land, I do object, on the ground that he obtained his information in confidence, and has no right to disclose it; and 5th, it is not the best evidence.)

Ans. At the time of the conversation alluded to, which was the time of the making of the deed by McCormick to Seely, I asked Mr. Horbach what he was going to have done with the balance of the land over and above the 10 acres deeded to Seely, and he said he was going to have McCormick deed it to his mother-in-law. I then asked him what he would do in case the sale was set aside in relation to the ten acres deeded to Seely, and he said in case the sale was set aside or the title conveyed by McCormick failed in any way, and he afterwards acquired title by virtue of his original pre-emption or in any other manner, that he would make the title good to that ten acres, and would make whatever conveyance was necessary to do so; and upon

71 that representations Mr. Seely accepted the deed in full payment for the services rendered, with the express understanding and agreement that in case the title did fail, and Horbach or any of his friends under his control obtained title to the land afterwards, that that title of ten acres conveyed to Seely should be made good; and Horbach agreed to make or cause to be made any conveyance which was necessary to perfect title to the land.

Cross-examination by def't's sol.

Int. 1st. You are asked in examination in chief, among other things, to state the manner of that public sale. Will you now state whether or not there was an organization formed the night previous to the sale for the purpose of attending that sale and protecting Horbach in bidding off that land at government price? and state whether or not you were one of that organization, and give the names of the others if you can.

(Objected to by complainant as immaterial and irrelevant, and not proper cross-examination.)

Ans. I know not and did not know of any such organization, and I do not think such organization was formed the night before. I do not know any person belonging to such organization.

Int. 2d. Was there not a meeting held at the office of Redick & Briggs the night previous to the public sale, for the purpose of making some arrangements by which Horbach should be protected at the public sale in buying in a portion of this land, and were you not one of a committee
72 on the part of Horbach in fixing up that arrangement? And if I am not quite correct in detailing the object of that meeting, will you be kind enough to state all about it, and what were its objects?

(Objected to by compl't as immaterial and irrelevant, and not proper cross-examination.)

Ans. On the night previous to the sale there was a meeting, at the office of Redick & Briggs, of the city council of the city of Omaha; Mr. Redick and myself, and perhaps some others I don't remember, for the purpose of settling a dispute in relation to the claim title to the land to be sold next day—the city council claiming it for the city of Omaha and Horbach claiming it for himself. At that meeting there was a proposition made and agreed to by the city council of the city of Omaha and Mr. Horbach, or Mr. Redick for him, (I know Mr. Horbach was there part of the time and consented to the arrangement,) by which they agreed to refer the matter to Messrs. Megrath, and myself, and we were to choose a third person, and we three to decide the dispute between the city and Mr. Horbach; and that is what I understood that meeting was gotten up for, and not for the purpose of protecting anybody in bidding off the land.

Int. 3d. Was that dispute settled by that committee, and was the land bid in at the sale in accordance with that settlement?

Ans. Mr. Megrath, Mr. Ruth, and myself decided what we thought would be right in the premises; but the land was not bid off in accordance
73 with that decision.

Int. 4th. Did you attend that sale the next day? And state about the manner of the sale, whether there was much noise and confusion, whether there was any threatening to shoot any person on that occasion; and if there were, what did they grow out of? State, if you know.

(Objected to by compl't as immaterial and irrelevant, and not proper cross-examination.)

Ans. I was present at the sale. The manner of the sale was the same as usual at sales of the public land at land offices; there was no unusual noise or confusion until after the sale. After the sale there was some excitement and some noise; there were no threats of shooting that I heard pending the sale.

Int. 5. What arrangement, if any, was made between you and Horbach as to what he should pay or what proportion of the land he should give in case you and others assisted him to get his title at the land sale?

(Objected to by compl't as immaterial, irrelevant, and not proper cross-examination.)

Ans. Mr. Horbach came to me and wished to employ me to assist him in procuring title to this land; said that he had employed Mr. Seely. I told Mr. Horbach that I had quit the practice of law, and that I didn't wish to take the responsibility of attending to it for him; but that as he had employed Seely, that any arrangement that he might make with Seely would be satisfactory to me, and that I would assist Mr. Seely what I could.

Int. 6th. Did Mr. Seely act for him during all the time until the
74 deed was made by McCormick to him?

Ans. Mr. Seely was his attorney all the time until the making of the deed.

Int. 7. What title do you refer to in your answer to the 8th interrogatory in your examination in chief?

Ans. I refered to the title both by pre-emption and at the sale. The services were rendered at and previous to the sale.

Int. 8th. Who else was present at Seely's office at the time of the conversation had then and refered to by you in the examination in chief?

Ans. Mr. Seely was present, and I think Jesse Lowe was present a part or all of the time; also McCormick and Horbach. I don't know that McCormick was there all the time, but he was most of the conversation.

Int. 9. What relation in law do you bear to Janas Seely and how long?

Ans. We were brothers-in-law, and are still.

A. J. HANSCOM.

John R. Porter, a witness produced, sworn, and examined on part of the complainant, says:

Int. 1. Do you know the parties to this suit, or any or either and which of them? If so, how long have you known them, respectively, or such of them as you do know?

Ans. I know John A. Horbach, and have known him about seven years. I don't know Wiggin. The first I ever knew of Wiggins, Mr. Redick informed me he had purchased this land of mine. I am one of the complainants and my wife is the other.

Int. 2d. When did Mr. Redick inform you of Wiggin's claim for
75 the first time?

(Objected to by defendant, that the same is leading and immaterial.)

Ans. Mr. Redick came to me this last spring early, and said he was the attorney for a man by the name of Wiggin, who lived in Pennsylvania, who had bought the five acres of ground owned by my wife, and that he wished to rent the land, and wanted me to give possession of the same.

Int. 3d. State, if you know, whether or not that at the time your wife purchased the premises in question of Seely Horbach knew she was so doing. State all your means of knowledge.

(Objected to by def't Wiggin, on the ground, 1st, it is leading; 2d, immaterial and irrelevant; and 3d, that it does not appear that Wiggin was present or knew anything of this transaction.)

Ans. I met Mr. Horbach one day on the street and *and* told him I was about buying five acres of that land he sold to Seely. He did not make any answer that I know of.

Int. 4th. When was this?

(Objected to by def't Wiggin as immaterial and irrelevant.)

Ans. This was in February, 1861.

Int. 5th. Was it before or after the completion of the purchase?

(Objected to by Wiggin as immaterial and irrelevant.)

Ans. It was before the completion of the purchase.

Int. 6th. State what information you and your wife, or either of you, had of Horbach's claim to the land at the time of the purchase.

76 (Objected to by Wiggin as immaterial and irrelevant.)

Ans. Mr. Seely told me—(here defendant objects to any statements made by Seely, on the ground that the same is hearsay and not the best evidence. Witness proceeds:)—that Mr. Horbach's title to the land was good; that McCormick had bid off the land for Mr. Horbach, and made him a deed for ten acres of the same, and the balance he had deeded to John Horbach's wife's mother; and that he had acquired these ten acres of land for legal services rendered for John A. Horbach. This was all the information I had. My wife had no information in the matter; I transacted the business for her.

Int. 7th. In your answer to the last interrogatory you state that Seely told you that Horbach's title to the land was good. State whether you there mean the title obtained by him through McCormick or his pre-emption title.

(Objected to by def's, 1st, as leading; and 2d, immaterial and irrelevant.)

Ans. I mean the title obtained through McCormick.

Int. 8th. What did your wife pay Seely for the premises in dispute?

Ans. Three hundred dollars.

Int. 9th. State whether your wife ever occupied or improved said premises. If so, when and how?

(Objected to by defendant Wiggin as immaterial and irrelevant, and does not appear Wiggin knew anything of this matter.)

Ans. The lot she had fenced the same spring and broken up and cultivated, and we have had the land under cultivation since.

77 Int. 10th. State whether or not you or your wife have the deed from McCormick to Seely in your possession.

Ans. We have not got it, and never had it.

Int. 11th. State whether or not during the time the premises were being improved by your wife Horbach had any knowledge thereof.

(Objected to by defendant Wiggin as immaterial and irrelevant.)

Ans. He did. He knew we were improving it; was there every few days and never made any objections to the same.

Cross-examination.

Int. 1st. State how you paid Seely for this land, whether money or property; and if property, what kind?

Ans. I gave him a span of horses, harness, and wagon; as he was going to California, he said he would rather the stock than the money.

Int. 2d. Did your wife ever actually occupy this land by residing on it, or where have you resided since its purchase?

Ans. We have both worked on the land. I have never resided on it; I have resided in the city.

Int. 3d. What kind of a deed did you take from Seely when you purchased—a warranty or quitclaim deed?

Ans. I took a warranty deed.

Int. 4th. Did not Seely insist on you taking a quitclaim deed, and did you insist on a warranty?

Ans. He never asked me to take a quitclaim deed.

78 JOHN R. PORTER.

Here the complainants offered in evidence, to be read on the hearing of this cause, a certified copy of letter of the Acting Commissioner of the Gen'l Land Office, dated June 24th, 1859, and marked Exhibit A; to which letter defendants object, on the ground, 1st, that the original is not proved to be lost; 2d, that the copy is not properly proved and certified to; and 3d, the same is immaterial and irrelevant.

Exhibit A, offered in evidence by complainant, Dan'l Gantt, master.

GEN'L LAND OFFICE, *June 24th*, 1859.

Register and Receiver, Omaha, N. T.

Your letter of June 5th, 1858, enclosing the testimony in the case of Omaha City *vs.* Jno. A. Horbach, elicited at rehearing of Horbach's claim in pursuance of instructions from this office, was duly received. Your joint letter contains a summary of the testimony, from which you conclude that

Horbach's entry was illegal, and therefore recommend its cancellation. Having carefully examined the testimony, I concur in your opinion, and have to advise you that the certificate of location per warrant No. 71,061, act of 1855, covering the S. ½ NW. ¼ and S. ½ NE. ¼, sec. 15, T. 15, R. 13 E., in the name of said Horbach, has been cancelled. Said location was made in special fraud of the 13th section of the act of 4th of Sep., 1841, which declares a forfeiture of the money paid for the land pre-empted. Please note the cancellation on your books and plats.

Very respectfully, &c.,

JOS. S. WILSON, *Acting Commissioner.*

79 Endorsed on Exhibit A:

"U. S. LAND OFFICE, *Omaha, Neb., Oct. 26th,* 1863.

"I hereby certify that the within is a true and correct copy of the original on file in this office.

"EDWARD B. TAYLOR, *Register.*"

Complainants also here introduce in evidence the certified copy of letter of said land officers, dated Oct. 15th, 1860, and marked Exhibit B; to the introduction of which defendants object, 1st, that the original is not proven to be lost; 2d, that the copy is not properly proven and certified; and 3d, the same is immaterial and irrelevant.

Exhibit B, offered in evidence by complainants, Dan. Gantt, master.

GEN'L LAND OFFICE, *Oct. 15th,* 1860.

Register and Receiver, Omaha City, N. T.:

GENTLEMEN: Refering you to my letter of 24th June and 11th Oct., 1859, relative to the claim of Jno. A. Horbach to the S. ½ of NE. ¼ and S. ½ NW. ¼, sec. 15, T. 15, R. 13 E., lying within the corporate limits of Omaha City, I have now to direct you to offer the aforesaid tracts of land at public sale to the highest bidder. To this end you will give the necessary notice in a newspaper of general circulation printed in Omaha City, once a week for eight successive weeks prior to the day of such sale. For the publication of said notice you will be allowed seventy-five cents per square for the first in-
80 sertion and half that sum for each subsequent insertion. A copy of the notice should accompany the voucher for the payment of the account, and reference should be made therein to this letter by its date as the authority under which your action in the matter has been made.

Advise this office of the final disposition of the tract in question.

Very respectfully, your ob't ser't,

JOS. WILSON, *Commissioner.*

Endorsed:

U. S. LAND OFFICE, *Omaha, Neb., Oct. 26th,* 1863.

I hereby certify that the within is a true and correct copy of the original on file in this office.

EDWARD B. TAYLOR, *Register.*

Complainants also introduce in evidence certified copy, the record of a deed from Josiah S. McCormick to Jonas Seely, marked Exhibit C; to the introduction of which def'ts object, 1st, that the original is not proven to be lost; 2d, the same is irrelevant and immaterial so far as defendant Wiggin is concerned.

"*Exhibit C, offered in evidence by complainant, Dan'l Gantt, master.*

Know all men by these presents that I, Josiah S. McCormick, of the city of Omaha, Douglas County, Nebraska, in consideration of the sum of one dollar in hand paid by Jonas Seely, of Omaha, Douglas County, Territory of Nebraska, do hereby sell and convey unto the said Jonas Seely the fol-
81 lowing described premises, to wit: commencing at the northwest corner of the southwest quarter of the northwest quarter of section number fifteen, in township fifteen (15) north, of range thirteen (13) east of the sixth principal meridian, in the Territory of Nebraska; running thence east forty rods; thence south forty rods; thence west forty roods; thence north forty rods, to the place of beginning, containing ten acres of land; and do hereby covenant with the said Jonas Seely to warrant and defend the said premises only against the lawful claims of all persons claiming by, through, or under me. Signed this 15th day of December, A. D. 1860.

JOSIAH S. McCORMICK.

In presence of A. J. HANSCOM.

TERRITORY OF NEBRASKA, *Douglas County, ss:*

On this 15th day of December, A. D. 1860, before me, a notary public in and for said county, in person came Josiah S. McCormick, to me known to be the identical person whose name is affixed to the above deed as grantor, and acknowledged the same to be his voluntary act and deed. Witness my hand and seal, at Omaha, Douglas County, N. T., the date aforesaid.

[SEAL.] LYMAN RICHARDSON, *Notary Public.*

Rec'd for record Dec. 15th, 1860. T. R. M.

I hereby certify that the foregoing is a true and correct copy from
82 the records of Douglas County, Nebraska. Witness my hand and official seal, at Omaha, in said county, this 26th day of October, 1863.

[SEAL.] BYRON REED,
County Clerk and ex officio Register of Deeds.

Complainants also introduce in evidence a deed from Jonas Seely and wife to Jane M. Porter, marked Exhibit "D."

Exhibit D, offered in evidence by complainant, Dan. Gantt, master.

This deed of bargain and sale, made and executed this 26th day of February, A. D. 1861, by and between Jonas Seely and Cornelia Seely, his wife, of the county of Douglas and Territory of Nebraska, party of the first part, and Jane M. Porter of the second part, witnesseth, that the said party of the first part, for and in consideration of the sum of three hundred dollars, to them paid by the said party of the 2d part, the receipt of which is hereby acknowledged, have granted and sold, and do by these presents grant, bargain, sell, convey, and confirm, unto the said party of the second part, her heirs and assigns forever, the certain tract or parcel of real estate in the county of Douglas, Territory of Nebraska, to wit: the south half of the following described land: commencing at the northwest corner of the southwest quarter of the northwest quarter of section number fifteen, (15) in township No. fifteen (15) north, of range No. thirteen (13) east of the 6th
83 principal meridian, in the Territory of Nebraska; running thence east forty rods; thence south forty rods; thence west forty rods; thence north forty rods, to the place of beginning; said tract conveyed to contain five acres of land.

To have and to hold the premises above described, with all the appurten-

ances thereto belonging, unto her, the said second party, and to her heirs and assigns forever; the said Jonas Seely and Cornelia, his wife, hereby covenanting for their heirs, executors, and administrators, that the above-described premises are free from any incumbrance; that they have full right, power, and authority to sell the same; and they will warrant and defend the title unto the said party of the second part, her heirs and assigns, against the claims of all persons whomsoever lawfully claiming the same And the said Cornelia Seely, wife of the said Jonas Seely, hereby releases and relinquishes all her right of dower in and to the foregoing described premises.

In witness whereof, the said party of the first part have hereunto set their hands and seals the day and year first herein written.

JONAS SEELY. [L. S.]
CORNELIA SEELY. [L. S.]

In presence of L. RICHARDSON.

TERRITORY OF NEBRASKA, *Douglas County, ss:*

Be it remembered, that on the 26th day of February, A. D. 1861, before the undersigned, a notary public in and for said county, came Jonas Seely and Cornelia Seely, his wife, to me personally known to be the identical
84 persons whose names are subscribed to the foregoing deed as granters, and acknowledged the instrument to be their voluntary act and deed, and that they executed the same for the purpose therein mentioned.

Witness my hand and notarial seal the day and year last above written.

[SEAL.] LYMAN RICHARDSON.

Endorsed: Warranty deed. Jonas Seely and wife to Jane M. Porter; transfer dated Feb'y 27th, 1864.

JAS. W. VAN NOSTRAND, *Co. Cl'k.*

TERRITORY OF NEBRASKA, *Douglas County:*

Filed for record this 27th day of February, A. D. 1861, at one (1) o'clock p. m., and recorded in Book N of ———, page 203.

THOMAS O'CONNER, *Recorder.*

FEB'Y 25th, 1864.

Met at my office, in Omaha, on notice to parties, at ten o'clock a. m Present: J. M. Woolworth, sol. for complainants; Redick & Briggs, sol. for defendant.

Evert V. Smith, a witness produced, sworn, and examined on part of complainants, says:

1. Where do you reside, and how long have you resided there?

Ans. I reside in Omaha, Nebraska, and have resided there about eight years.

2. Do you know John A. Horbach, and Josiah S. McCormick, and Jonas Seely, and A. J. Hanscom, or either of them? If so, how long have you known them, respectively, or such of them as you do know?

Ans. I do know them all for nearly eight years, except McCormick, and have known him for five or six years.

85 3d. Are you acquainted with the south half of the northeast quarter of the south half of the northwest quarter of section fifteen, town. fifteen, range thirteen east, the same being the premises claimed by pre-emption by said John A. Horbach? If so, how long have you known the same?

Ans. I am acquainted with the premises about six years.

4th. State whether or not you were present at the public sale of said land made by the register and receiver of the Omaha land office in December, 1860.

(Objected to by def't on the ground that it is matter immaterial.)

Ans. I was.

5th. State who bid said land in at said sale.

(Objected to by def't as immaterial and incompetent, the records of the land office being the best evidence.)

Ans. Mr. Josiah S. McCormick.

6th. State, if you know, for whom he bid the same in and your means of knowledge upon the subject.

(Objected to by def't as immaterial and incompetent.)

Ans. I suppose he bid it in for Mr. Horbach, as Mr. Horbach told me that he was going to have him bid it in for him.

7. State whether or not you ever had any conversation with said Horbach as to conveyances made or to be made by McCormick of said premises
86 or any part thereof. And if so, when, where, and what did he say in that regard?

(Objected to by def't as immaterial, incompetent, and it does not appear that defendant Wiggin was present at any such conversation.)

Ans. I don't recollect the time or place, but he told me he was going to have it deeded to his mother-in-law.

8th. State whether or not this conversation took place within three months of the time of said sale.

(Objected to by def't as immaterial and leading.)

Ans. It was within that time.

9. State whether or not he assigned any, and if so, what, reason he had for having said conveyance so made.

(Objected to by def'ts Horbach and Wiggin as immaterial, leading, and does not appear that Wiggin was present.)

Ans. The reason he gave was that he had deeded some lots under his pre-emption. He didn't want to give them the title to them.

10. State whether or not at said sale, the said Horbach bid on said land.

(Objected to by def'ts Horbach and Wiggin as immaterial and leading.)

Ans. I don't think he did; don't recollect that he did.

Cross-examination.

1. Was you present at the sale?

Ans. I was.

2d. How many people, in your opinion, were present at that sale?
87 Ans. I don't know that I can give any accurate idea of the number; the office was full and some could not get in.

3. Will you please name all those you know who were there?

Ans. There was Josiah S. McCormick; I think John McCormick; also Mr. Horbach, Doctor Monell, C. W. Hamilton, Mr. Hanscom, Mr. Seely, Mat. Patrick, Jesse Lowe; I think Mr. Meredith. I don't think of any more names now.

4. Who else bid on this land except McCormick on that occasion?

Ans. Charles W. Hamilton.

5. Who requested you to attend the sale on that day, if any one?

Ans. No one requested me to attend the sale.

6. What do you know, if anything, about an arrangement being made the night previous to the sale, by which Horbach was to be protected in bidding in his portion of the land, whatever it was, on that occasion?

(Objected by complain't as not proper cross-examination and irrelevant.)

Ans. I don't that any arrangement was made where he was to be protected.

7. What was the arrangement, and was there not some arrangement of some kind made and talked by Hanscom, Jesse Lowe, Mathison Patrick, yourself perhaps, and others, in regard to assisting each other in bid-
88 ding in your land at government sale? Please state what it was.

(Objected by compl'nt as not proper cross-examination, immaterial, and irrelevant.)

Ans. I don't know anything about such an arrangement as that.

8. Was there anything said between yourself and others in regard to it?

(Objected to by compl'nt as not proper cross-examination, immaterial, and irrelevant.)

Ans. No, sir, not that I know of.

9. Will you swear that John A. Horbach did not bid on that land on that occasion?

Ans. I would not swear that he did not, but I don't think that he did.

E. V. SMITH.

A. J. Hanscom, a witness produced, sworn, and examined on part of complainant, says:

1. State whether or not, in the engagement made between you and Seely with defendant Horbach in reference to the premises in question, you and Seely undertook to secure the land for Horbach at any particular sum. If so, at what sum? And state all that was said between you in reference to that point.

(Objected to by def't Wiggin, on the ground that the same is leading, irrelevant, immaterial, and indefinite, it not appearing that this def't was present or knew any of the matters referred to in the question;
89 and objected to by defendant Horbach, on the ground that it is leading, indefinite, and immaterial.)

Ans. I can state that we never made any agreement to procure the land in question at any price. There was nothing said with reference to procuring the land at any partiular price.

2. State whether or not the def't Horbach bid on said land at the said public sale thereof.

(Objected to by def't Horbach, on the ground that it is leading, and by def't Wiggin as leading and immaterial.)

Ans. He did bid on said land.

3. State whether or not he bid upon the whole or part; and if part, what part thereof?

Ans. He bid on the part that was first offered for sale. It was the first eighty; I don't remember which eighty. I don't think he bid on the whole, but I won't be positive.

4. State whether or not Seely ever rendered any other legal services than attending this sale for Horbach. If so, what and when?

(Objected to by def'ts as leading and that it don't appear that Seely attended this sale for Horbach.)

Ans. He did. He was Mr. Horbach's attorney in procuring his pre-emption or assisting to procure the same. Previous to the sale he had been his attorney to assist in procuring his pre-emption. I had seen him at
90 his office frequently.

5th. State, as near as you can, when these services commenced and during what period they continued.

(Objected by def'ts as immaterial.)

Ans. I am unable to give the date when they commenced. It was about the time he attempted to pre-empt, and continued up to the time of the sale.

Cross-examination.

1. You state you and Mr. Seely undertook to secure this land for Horbach. Will you now state when?

(Objected to by complainants, because the question seeks to mislead the witness, he not having stated that he undertook to procure the title. Question waived.)

2d. How often did McCormick bid on this tract?

Ans. I am unable to say how often. He bid it off.

3d. How often did Horbach bid on this tract?

Ans. I should think as often as once a minute until it was bid off.

A. J. HANSCOM.

Augustus Macon, a witness produced, sworn, and examined on part of complainant, says:

1. State what relations of friendship or otherwise existed between you and John A. Horbach during the years 1860 and 1861. If at any time during those years unfriendly relations existed between you, state the
91 cause of the same and when the same arose.

(Objected to by deft's as immaterial and irrelevant.)

Ans. From the year 1857 until some time in August, 1860, my relations with Horbach were of a very friendly nature. During the most of that time I was his attorney. About some time in July or August, 1860, I called on Mr. Horbach to pay me for the legal services I had rendered for him, and he disputed my account, and unfriendly relations grew out of the settlement of my account. That was the first and only unfriendly matter that arose between us.

2d. Who were Horbach's attorneys in prosecuting his pre-emption claim, and what was the extent and value of the services so rendered to him?

(Objected to by def't Wiggin as irrelevant and immaterial, and by def't Horbach as irrelevant and immaterial.)

Ans. His attorneys were myself and Jonas Seely in his case. I did comparitively little; Jonas Seely did most all the work. The services consisted in first trying the case before the land office, which occupied three days in examining witnesses and preparing the case. Seely then took charge of the whole case, as I had other matters to attend to. He, Seely, took
92 the case, and did everything that was to be done in it. I was only consulted in the case now and then. Seely prepared all the papers and affidavits in the case, which were numerous. Horbach told me that Seely acted as his attorney in compromising the land with the city and purchasing the land at public sale when McCormick bid it in. (Here def't Wiggin objects to witness giving any conversation he had with Horbach as he, Wiggin, was not present. Witness proceeds:)—I suppose the services were worth one thousand dollars.

Cross-examination.

1st. When did Horbach make that statement to you which you have mentioned?

Ans. In December, 1860, in my office, at the time or immediately after the sale.

2. When, if ever, did you bring suit against John A. Horbach in the district court of Douglas County, N. T.?

Ans. I think on the 31st day of August, 1861.

3. Had you not before that time asked him to settle your claim, and had not you and he had some hard words before you brought your suit?

Ans. Yes, sir; we had some about two weeks or a month before I brought

suit. I spoke to Mr. Horbach about the settlement of my account,
93 and he refused to settle. I told him I would sue him, and did sue him shortly afterwards. This was the first time I ever mentioned the matter to him.

4th. How much did you claim by your suit? And if it has since been paid, how much did you get?

Ans. I don't remember just how much I claimed; but rather than have any further trouble I compromised and took fifty dollars.

5. Do you not remember that your claim was three hundred dollars?

Ans. I do not.

6. State as near as you can what you claimed?

Ans. It was between two hundred and fifty dollars and five hundred dollars.

AUGUSTUS MACON.

Jesse Low, a witness produced, sworn, and examined on part of complainants:

1. Were you acquainted with John A. Horbach, Josiah S. McCormick, Jonas Seely, and A. J. Hanscom? If so, how long have you known them respectively?

Ans. I have known them all ever since they have lived in this county.

2d. Were you ever present at any conversation between said Hanscom, Seely, and Horbach, relative to the former assisting the latter in
94 procuring title to his pre-emption claim at the public sale of the land by the United States? If so, when and where did the same take place, and what was said at the time by said parties?

(Objected to by def't Wiggin, 1st, as leading; 2d, immaterial, it not being shown that he was present at the time of that conversation; and def't Horbach objects as leading and immaterial.)

Ans. I was present at a conversation between those persons previous to the sale of a tract of land called the Horbach tract, in the winter of 1860, and after the said tract had been advertised by the land officers at Omaha. It was in front of Bridge's Block, in Omaha. The conversation related entirely to the purchase of the said tract so advertised. Mr. Horbach then was trying to effect a compromise with the city of Omaha, as they claimed a large portion or all of it, which he said he would rather do than loose the whole, and was trying to get Seely, Hanscom, and myself to assist him, and succeeded first in procuring the agreement of Seely and Hanscom to do the same by agreeing to give them five hundred dollars each.

3. Do you know for whom Josiah S. McCormick bid said land off for at said sale? If you do, state for whom and your means of knowledge.

(Objected to by def't Wiggin as immaterial, it not appearing that he was present and knew anything of this transaction; and by Horbach as irrelevant and immaterial and not the best evidence.)

Ans. He bid it off for John A. Horbach. I knew from the facts
95 and circumstances that transpired during the progress of the sale, and before and after.

Cross-examination.

1. You say that an arrangement was fixed up between Horbach and the city of Omaha, do you?

Ans. I do.

2. What was that agreement, and was it in writing?

Ans. I don't remember whether it was in writing or not, but as I learned it from Horbach and the referees, Horbach was to bid off a portion or some one for him, and the city to bid off the other portion.

3d. What necessity had Horbach for Hanscom and Seely to keep him to do that?

(Objected to by complainants as not proper cross-examination, as immaterial and irrelevant, and calls for the opinion of the witness.)

Ans. Hanscom was a referee for Horbach and Seely to render what assistance he could, he and Hanscom co-operating in their efforts.

4. Do you mean to be *be* understood that they were employed by Horbach simply to make this negotiation with the city?

Ans. Not entirely, but assist him to the end, whatever that might be, in procuring his land.

5. What assistance was anticipated, if any, by Horbach after the negotiation was made with the city, from Hanscom, Seely, yourself, and others?

(Objected to by complainants as not proper cross-examination, immaterial, irrelevant, and it does not appear that the witness had any knowledge
96 or means of knowing of Horbach's anticipations.)

Ans. It was to attend the land sale and render what assistance he required, if any were necessary.

6th. What did he say might be necessary to do at the land sale?

(Objected to by complainant as not proper cross-examination and immaterial and irrelevant.)

Ans. Things around the land office were pretty rough sometimes, and he desired not to be driven away, but have a fair chance with the city.

7. Do you not mean that the bargain was that you should all protect Mr. Horbach in bidding the land in at one dollar and twenty-five cents per acre?

Ans. I mean that we were to protect him as a peaceful bidder, but at no particular price per acre, but simply as a bidder.

8th. Do you not remember the arrangement was that John McCormick was to bid in one half of this land and Monell the other half?

Ans. That was the first arrangement.

9. When was that conversation had which you spoke of having with Horbach and those other men?

Ans. It was two or three days before the referees met at Ruth's store. It was not more than two or three days before the sale.

10. Was that the only conversation you had with Mr. Horbach in regard to it?

Ans. No; I had frequent conversations with him about his land. I had frequent conversation with him before the sale, but none after.

97 11. Was that arrangement or negotiation spoken of by you carried into effect? I mean the arrangement by which Horbach, or some one for him, should buy one part and the city the other?

(Objected to by complainant as immaterial, irrelevant, and not proper cross-examination.)

Ans. It was not.

JESSE LOWE.

By consent of solicitors of parties, adjourned to meet at my office in Omaha, February 26th, 1864, at 11 o'clock a. m.

February 26th, 1864, met pursuant to adjournment. Dan. Gantt, master, Present: J. W. Woolworth, esq., for complainants; Redick & Briggs, esq., for defendants.

Matthison T. Patrick, a witness produced, sworn, and examined on part of complainant, says:

1. Are you accquainted with John A. Horbach and Josiah S. McCormick? If so, how long have you known them, respectively?

Ans. I am. I have known them since the summer of 1857.

2. State whether or not you ever had any conversation with them as to whom McCormick bid in the Horbach pre-emption claim for when the same was sold by the government at public sale. If so, when did that conversation take place, and what was said in that regard?

(Objected to by def't Horbach as leading, immaterial; and by def't
98 Wiggin, because it is immaterial, irrelevant, and it does not appear that he was present and knew anything of the conversation, if any there was.)

Ans. About the 15th of December, 1860, Mr. Horbach told me if McCormick bid on his land, not to interfere with him, for he had made arrangements for him to bid for him. I don't know as I had any conversation with McCormick.

Cross-examination.

1. What arrangement did he allude to when he requested you not to interfere with him?

(Objected to by complainant as calling for the opinion of the witness and not the best evidence)

Ans. I took it that he alluded to the arrangement that McCormick was to buy the land for him.

2. Do you not remember, and did he not state to you in substance, the arrangement as follows: that the city of Omaha was to buy in a portion, Mr. Monell bidding for it, and McCormick to buy the balance in for John A. Horbach?

(Objected to by compl't, on the ground that it does not call for what was said, but the substance merely.)

Ans. I have not it clear in my head whether he did or not. My recollection is not clear on that, but it is clear that his part was to be bid in by McCormick.

3. Do you not remember that the arrangement was this, as you understood it from Horbach and others: that the city, by Monell, was to bid in a portion of the tract, and John McCormick was to buy in the other portion for Horbach.

99 Ans. As for John McCormick, I never heard his named mentioned in connection with the sale.

4. Will you swear that you heard mentioned at that time, by Horbach or any one else, any other name in connection with the bidding off the land except the name McCormick?

Ans. I have no recollection of hearing used any name except Dick McCormick.

5. Did Horbach tell you that by the arrangment made, spoken of by him at the time, Dick McCormick was to bid off the land for him?

Ans. I answer this question as I did the first question, that he told me not to interfere with Dick McCormick, for he was to bid for him.

6. When he requested you not to interfere did he mean thereby, and did you so understand him, that if anybody else bid you were to interfere with them?

(Objected to by compl'nt as calling for the opinions of the witness, and not a proper cross-examination.)

Ans. Yes.

7. Who else was there for the same purpose? Name them or some of them.

(Objected to by complainant as not proper cross-examination, immaterial, and irrelevant.)

Ans. E. V. Smith, Doctor Seymour, John A. Horbach, Jesse Lowe, A. J. Hanscom.

8th. If outsiders—interlopers—should have come in and bid against
100 those claiming the land, what would have been the result, in your opinion?

(Objected to by complainant as not proper cross-examination, and calls for the opinion of the witness.)

Ans. Judging from some other cases, there would have been some loud talking, but nobody hurt; that there would have been a fuss or a row.

9. State, from what you know of that public sale, whether it would have been safe for any outsider to have bid against Horbach or McCormick, and whether, in your opinion, he would not have received a severe punishment of some kind.

(Objected to by compla'nt as not proper cross-examination, immaterial, irrelevant, and calls for the opinion of the witness.)

Ans. I suppose he would have been punished in some way or put out of the room.

10. Who invited you to attend the sale and help protect Horbach in bidding on that land?

(Objected to by complain't as not proper cross-examination, immaterial, and irrelevant.)

Ans. John A. Horbach, and I have reason to believe he notified all he wanted to attend.

11. Who was present when Horbach told you as you have before herein stated, and when was it?

Ans. I believe it was in Bridge's Block buildings—the land office; and there were others by, but I do not know whether they heard the conversation—Hanscom, Jesse Lowe, E. V. Smith, Dick McCormick, and others;
101 likely Dick McCormick heard the conversation, but I am not certain.

Re-examination.

1. What is the proper name of Dick McCormick?

Ans. He writes his name Josiah S.

M. T PATRICK.

TERRITORY OF NEBRASKA, *Douglas County, ss:*

I, Daniel Gantt, master in chancery in and for said county, do hereby certify Augustus Macon, Andrew J. Hanscom, J. R. Porter, Evert V. Smith, Jesse Lowe, and M. T. Patrick, the foregoing named witnesses, were by me each first duly sworn to testify the truth, the whole truth, and nothing but the truth; that the foregoing depositions, by them respectively subscribed, were reduced to writing by me in their presence and by them subscribed in my presence, and were taken at my office, Omaha, said county, at the several times therein stated.

Witness my hand this 11th day of April, A. D. 1864.

DAN. GANTT, *Master in Chancery.*

And thereupon, afterwards, to wit, on the 5th day of May, A. D. 1864, depositions on the part of said defendants were filed in the office of the clerk of said court, which said depositions were in the words and figures respectively following, to wit:

Depositions of witnesses taken in a certain cause pending in the district court of Douglas County, Nebraska Territory, in chancery, wherein
102 John R. Porter and others are complainants and John A. Horbach *et al.* are defendants, in pursuance of an order of reference made by said court and to me directed.

Pursuant to notice, met at my office in Omaha. Present: Redick & Briggs, sol. for defendants; James M. Woolworth, sol. for complainants.

Josiah S. McCormick, a witness produced, first sworn, and examined on part of defendants, says :

Int. 1. What is your age and place of residence ?

Ans. My age is 28 years, and residence Omaha City.

Int. 2. Do you know the parties to this suit, and do you know Jonas Seely and Andrew Jackson Hanscom ?

Ans. I know the parties, except this Mrs. Porter and Wiggin. I know Jonas Seely and A. J. Hanscom.

Int. 3. What was the real consideration for conveying by you the ten acres of land described in the deed in this case, offered in evidence in this cause, and marked "C?" I mean conveying by you to Jonas Seely ten acres of land adjoining Omaha, in section fifteen, township fifteen, range thirteen east.

Ans. It was for services that were to be rendered by Jonas Seely and A. J. Hanscom in procuring at the public sale, at the land office in
103 Omaha, the west eighty acres of that tract that was sold, at one dollar and twenty-five cents per acre, and protecting him in the title of sale, if made.

Int. 3d. Was that all the consideration received ?

Ans. It was all.

Int. 4. What did you know at the time you made this deed, if anything, and was there anything said at that time by any of the parties who were present, about John A. Horbach's being indebted to Jonas Seely in any way?

Ans. I know nothing of Horbach's being indebted to Seely for anything or any old matter. Nothing was said there in my presence about it. I never heard of Horbach owing Jonas Seely anything.

Int. 5. At the land office who was you bidding for if not for yourself on this land ?

Ans, I was bidding for myself.

Int. 6. Who did you bid that land in for ?

Ans. For myself.

Int. 7. Who were Horbach's attorneys to protect him in bidding it in at one and 25-100 dollars per acre.

Ans. Jonas Seely and A. J. Hanscom were acting in that capacity.

Int. 8. What did Hanscom say, if anything, when you came to make the deed, about Jonas taking it all in his own name ?

104 Ans. It was at his request it was done. I don't remember the conversation all.

Int. 9. What promises did John A. Horbach make at the time in regard to the title in case yours should fale ?

Ans. I dident hear him make any. They thought the title was good.

Cross-examination by compla'nts.

Int. 1. Did you make the deed to Seely before or after the public sale ?

(Objected to by def'ts as not proper cross-examination.)

Ans. After the public sale.

Int. 2. Did you not make it at Horbach's request ?

Ans. I made it at the request of Mr. Hanscom and Mr. Seely. No, sir; I did not at Horbach's request.

Int. 3. Did not Horbach direct you to make it ?

(Objected to by def't as not proper cross-examination.)

Ans. No, sir.

JOSIAH S. McCORMICK.

John A. Horbach, a witness produced, first sworn, and examined on part of defendants, says :

Int. 1. What is your age and place of residence, and how long have you there resided ?

Ans. My age is 31 years; residence, Omaha, and have resided there since the spring of 1856.

Int. 2. Did you ever pre-empt a tract of land near Omaha ? And if so, what tract and when ?

105 Ans. I did pre-empt the south half of the northeast and south half of the northwest quarter of section fifteen, township fifteen, and range thirteen east and adjoining the city of Omaha. I laid claim to it in 1856, and entered the land at the land office, in Omaha city, and paid for the same November 21st, A. D. 1857.

Int. 3. When did you get your title perfected to said premises by receiving your patent ?

Ans. In the spring, or rather winter of 1861.

Int. 4. Was you ever indebted to Jonas Seely for services or otherwise ?

Ans. I had a conditional arrangement with him by which I would be indebted to him if I obtained title to the land at one 25-100 dollars per acre.

Int. 5. Do you mean at the public sale, or what ?

Ans. At public sale.

Int. 6. Did you obtain title to the land at one 25-100 per acre at public sale ?

Ans. No, sir, nor at no other price.

Int. 7. Then answer the question. Were or are you indebted to Jonas Seely for services rendered for you at any time ?

Ans. No, sir.

Int. 8. What was the real consideration by McCormick received for conveying the tract of ten acres of this land, by you pre-empted, to

106 Jonas Seely, and why was it not conveyed to Seely and Hanscom ?

Ans. I know of no consideration except the promise of Seely and Hanscom to sustain his entry by purchase, and such services as they may have rendered him at the sale in bidding in the land.

Int. 9. Who did McCormick bid in the land for ?

Ans. I suppose he bid it in for himself. He did not bid it in for me.

Int. 10. Who was your attorneys to protect you at said sale in buying it in at one and 25-100 dollars per acre ?

Ans. A. J. Hanscom and Jonas Seely.

Int. 11. State when you first learned that Seely had sold the land in dispute to Mr. Porter or his wife.

Ans. It was on my return from the East, the latter part of March or first of April, 1861.

Int. 12. State what you know of Seely's negotiating with Mr. Porter or his wife about the land.

Ans. I never heard of any negotiations about the land with Porter or anybody else.

Int. 13. What was said by Hanscom, if anything, at the time McCormick made the deed to Seely ?

(Objected to by complain't, because it does not appear that the witness was present at the time.)

107 Ans. He told McCormick to put the ten acres in Seely's name, as he did not want to be known in the transaction, as he would have to appear as a witness before the land office in sustaining McCormick's title.

Int. 14. What representations or promises did you make, if any, in regard to protecting the title of McCormick in case it failed and you succeeded in maintaining your original entry ?

Ans. I made no promises or representations of any kind to Mr. Hanscom or Mr. Seely, or any one else, by which I was to make the title good.

Int. 15. What was said, if anything, by Hanscom and Seely at that time as to the probability or improbability of sustaining the McCormick entry? (Objected to by compl'nt as immaterial.)

Ans. Hanscom said he would risk the title of McCormick; that all hell couldn't break it.

Int. 16. What did Porter know, if anything, when he bought of Seely, in regard to your claim to the land, and whether you had any conversation with him on that subject?

Ans. Porter knew that I had a certificate by pre-emption to this tract of land, embracing the tract in controversy, and knew that I was deter-
108 mined to maintain my title. He had repeatedly asked me about it in 1857, 1858, 1859, and 1860, all along.

Int. 17. What improvements had you on the tract at the time he bought, and of what did they consist?

Ans. A house and stable, about ten or twelve acres of breaking, and about fifty acres enclosed with fence.

Int. 18. State who, if any person, ever lived on the tract in dispute, and whether, if you know, there was any house, barn, or out-house, or anything of the kind on the tract.

Ans. There was never any house upon or any person lived upon the tract.

Int. 19. Had you any conversation with Augustus Macon before or after this public sale with reference to this tract in dispute or anything concerning it? And if you should answer you had not, state how you know you had not.

Ans. I had not; at least for a year before the sale, and never since. It was about six months before I was not on speaking terms with Mr. Macon.

Int. 20. Did you ever state to Hanscom, or anybody else, anything in regard to the purchase of the land by McCormick, in reference to your interest in the purchase in any way?

(Objected to by compl'nt as leading.)

Ans. I did not to Mr. Hanscom, or any one else that I recollect of,
109 except Mr. Seely. He came after me after the sale was over and wanted me to have Dick make him and Hanscom a deed. I told them they had not carried out their agreement with me, and that I had received no title, and that Dick McCormick might do as he pleased.

Cross-examination by compl'nt.

Int. 1. Did you not have a conversation in the city of Washington in the winter of 1860-'61 with J. N. H. Patrick, in which you stated that you wished to get his assistance in setting aside the McCormick entry in order that you might receive back the money with which he paid for the land?

(Objected to by def't as not proper cross-examination and leading.)

Ans. I never had any such conversation with J. N. H. Patrick, in Washington or anywhere else, and never asked him for any assistance in any way that I recollect of.

Int. 2. Did you not then and there apply to him to get for you or aid you in getting scrip of some sort with which to enter said land?

(Objected to by def'ts as not proper cross-examination, leading and immaterial.)

Ans. I did not.

Int. 3d. Did you not then and there tell him that you wished to
110 enter the land and have neither your pre-emption nor McCormick's purchase sustained, in order that you might be relieved of deeds which you had made to parts of the tract and have all the property yourself?

(Objected to by def't as not proper cross-examination, leading and immaterial.)

Ans. I did not.

Int. 4. What is the name of your wife's mother?

(Objected to as not proper cross-examination and immaterial.)

Ans. Rebecca Wallace.

Int. 5. Was she ever in this country—in this Territory?

(Objected to as not proper cross-examination and immaterial.)

Ans. Not that I know of.

Int. 6. Did she ever hold the title to any part of the land pre-empted by you?

(Objected to by def't as not proper cross-examination, not the best evidence, and immaterial.)

Ans. I believe not.

Int. 7. Did not McCormick convey a part or the whole of the land pre-empted by you to her?

(Objected to by def't as not proper cross-examination, not the best evidence, and immaterial.)

Ans. I think he made a deed. I don't think it was ever acknowledged or delivered.

Int. Did you not yourself take such deed to the register's office to be recorded?

111 (Objected to by def't as not proper cross-examination and immaterial.)

Ans. I have no recollection of having done so.

Int. 9. Did you not have that deed in your possession at one time?

(Objected to by def't as not proper cross-examination and immaterial.)

Ans. I have no recollection of ever having that deed in my possession.

Int. 10. Did you not receive the money returned by the government, paid for the McCormick entry?

(Objected to by def't as not proper cross-examination, leading, and immaterial.)

Ans. I did not.

Int. 11. Do you not know that she received it?

(Objected to by def'ts as not proper cross-examination, irrelevant, and immaterial.)

Ans. I do not.

Int. 12. Who do you mean by Dick when in answer to the twentieth interrogatory, that Seely wanted you to have Dick to make him and Hanscom a deed?

Ans. J. S. McCormick.

Int. 13. Did you not, before the public sale to McCormick, and on the day of the sale, and at the city of Omaha, tell Jesse Lowe that McCormick was going to bid on the land for you?

112 (Objected to by def'ts, on the ground that it seeks to mislead the witness, for he may have told Jesse Lowe that Jno. McCormick was going to bid on the land for him.)

Ans. I did not so tell him before, but may have told him on the morning of that sale that John McCormick, under an arrangement with the city of Omaha and myself, was to bid in the east eighty and I was to bid in the west eighty; that such an arrangement had been made the evening previous.

Int. 14. Did you not, on the day of the sale and before it took place, at the city of Omaha, tell Jesse Lowe that J. S. McCormick or Dick McCormick was going to bid on the land for you?

(Objected to by def'ts, on the ground that it is immaterial what he told him, for it was not true if he did.)

Ans. I did not.

Re-examination by defendants.

Int. 1. Under what circumstances did Hanscom and Seely derive all their knowledge, if any they have got, about this transaction?

Ans. As attorneys for me.

JOHN A. HORBACH.

MARCH 11th, 1864.

Examination of witnesses in this cause resumed. Redick & Briggs appear as sol. for defendants; J. M. Woolworth appears as sol. for complainants.

Byron Reed, a witness produced, sworn, and examined on part of de-
113 fendants.

1st. State your residence and occupation, and whether you are acquainted with the complainants in this suit. And if so, how long have you known them?

Ans. My residence, Omaha, Nebraska; occupation, clerk of Douglas County. I am acquainted with complainants, and have known them six or eight years.

2. Please state whether you ever had any conversation with the complainants in this suit in regard to the purchase of the tract of land in dispute. And if so, what was said and when was that conversation had?

Ans. I had a conversation with John R. Porter. I think it was in May, 1861. He inquired about any contest in relation to the land. I told him that Charles W. Hamilton had commenced proceedings to contest the validity of the purchase of this land by Josiah S. McCormick. The conversation took place in my office.

3. Was it or was it not before he had purchased of Seely. And what did you tell him in regard to the probability or improbability of setting aside the sale to McCormick, if anything?

Ans. I can't say whether it was before or after the purchase from Seely. I told him I thought Hamilton would eventually get the land.

4. What is your best recollection as to whether it was before or after the sale? And did you or did you not advise or say to him that it would
114 be unsafe for him to purchase the tract?

(Objected to by complainant as leading.)

Ans. My impression is that it was before the deed was executed to him by Seely, but I think he said he had made the purchase. I don't recollect of giving him any advice on the subject.

5. What was your occupation at that time when he called at your office and conversed with you in regard to it?

Ans. I was engaged in the business of real estate agent and investigator of titles, &c.

Cross-examination.

1. Did Porter speak to you upon this subject in your professional capacity or casually?

Ans. I think it was casually.

BYRON REED.

A. J. Hanscom, a witness produced, sworn, and examined on part of def't, says:

1. Was you acquainted with the span of horses that Jonas Seely got of John R. Porter for the land in dispute. And if so, what did he do with those horses before leaving for the West?

(Objected to by complainant as immaterial, irrelevant, and leading.)

Ans. I was acquainted with a span of horses that Mr. Seely got of Mr. Porter, that I supposed he received in part for this land. He sold them to me.

115 2d. Did you or did you not take them as your share of the fee growing out of the Horbach land matter?

Ans. I took them of Mr. Seely in full satisfaction of what he was owing me; considered I paid him all they were worth.

3d. In that purchase of those horses was or was not your share of the fee growing out of the Horbach land matter considered?

(Objected to by complainant as immaterial and irrelevant.)

Ans. I had no share in the fee. I took them in full satisfaction of what Mr. Seely was owing me at the time, in full for everything.

A. J. HANSCOM.

Here, by consent, defendants offered in evidence, to be read on the hearing of this cause, letter from Hon. J. M. Edmonds, Commissioner of the Gen'l Land Office, dated Sept. 3d, 1861, and hereto attached, marked Exhibit A.

Exhibit A, offered in evidence by defendants, Dan. Gantt, master.

GEN'L LAND OFFICE, *Sept. 3d*, 1861.

GENTLEMEN: I have carefully examined the testimony which accompanied your joint report of the 22d of July last, in reference to the public sale at your office, on the 15th Dec. last, to J. S. McCormick of the S. ½ of the NW. ¼, and the S. ½ of the NE. ¼ of sec. 15, T. 15 N., R. 13 east, 6th P. M.,

116 per certificate 1,456 and 1,457.

This testimony states that the night before the day of sale an arrangement was made between certain parties and John A. Horbach, to the effect that Horbach was to bid on the west 80 of said lands, and they would see that there was no bid against him. Mr. John McCormick was selected by them to bid on the east 80, and convey to Horbach all his improvements, and 20 lots as they claimed on survey for town purposes, without any consideration from him. It also appears from the evidence that attempts were made by intimidation to hinder or prevent persons from bidding or purchasing the first-mentioned tract. The aforesaid arrangement and attempt at intimidation being in direct violation of the 4th section of the act of Congress, approved March 31st, 1830, for the suppression of fraudulent practices at the public sales of the lands of the United States, &c., (Stat., vol. 4, p. 392,) I have cancelled the certificate of sale.

You will please note the cancellation in your books. I have enclosed a copy of this letter to Hon. R. M. Young, the attorney of Rebecca Wallis, the assignee of the purchaser, and advised him to request her to apply for the return of the purchase-money under the acts of 12th of January, 1825, and February 28, 1859.

117 These tracts will hereafter be duly offered after proper public notice, but not until you receive specific instructions.

Respectfully, your ob't ser't,

J. M. EDMONDS, *Commissioner.*

REGISTER AND RECEIVER, *Omaha City, Nebraska.*

MARCH 15TH, 1864.

Examination of witnesses resumed in this case. James M. Woolworth appears as sol. for complainants; Redick & Briggs, sol. for defendants.

William R. Demarest, a witness produced, sworn, and examined on part of defendants:

Int. 1. Was you present at the special sale of a tract of land known as the S. ½ of the northwest quarter and south half of the northeast quarter of section fifteen, township fifteen north, of range 13 east, being the tract preempted by John A. Horbach, which was offered at public sale on the 15th day of December, 1860?

Ans. I am not acquainted with the boundaries of it, but I was present at that sale.

Int. 2. Will you state whether or not there were any threats of personal violence and acts of intimidation used on that occasion to prohibit free bidding at said sale? and if so, state what was said as near as you can,
118 and what was done in that regard.

(Objected to by complainant as immaterial, irrelevant, and leading.)

Ans. There were threats of personal violence; and I considered the meeting a very dangerous one for any civil person to be in. I heard words, but who uttered them I am not prepared to say; I heard some one say that if that gray-eyed son of a bitch bids against me I will shoot him, or words paramount to it; it is fresh on my mind yet, and the general aspect of that meeting was in my mind very dangerous, and I retired in consequence.

Int. 3. What do you recollect, if anything, in regard to some one seizing hold of Charles W. Hamilton, who had bid upon this tract?

(Objected to by complainant as immaterial, irrelevant, and leading.)

Ans. I didn't see any one lay violent hands on him; I noticed he was shouldered and baffled about a good deal in the crowd; he was pushed.

Int. 4. From your recollection of that meeting, and from what you saw on that occasion, state whether or not it would have been safe for an outsider to have bid upon that land.

(Objected to by complainant as immaterial and irrelevant, as leading.)

119 Ans. I didn't think it was safe at that time, and I still have that opinion.

Cross-examination.

Int. 5 Who made those threats of personal violence?

Ans. Well, I can't now designate or single out the persons. I heard them on the sidewalk and the same at the sale.

Int. 6. Who were they addressed to?

Ans. The remarks I heard in the room I supposed to be addressed to Mr. Hamilton before he commenced bidding, and I heard him remark that he intended to bid notwithstanding. That is as far as my recollection serves me at present.

WM. R. DEMAREST.

Josiah S. McCormick, a witness produced, sworn, and examined on part of defendants:

1. Who was present when the deed of the tract in dispute was given to Jonas Seely, and where was it delivered, and who delivered it to him?

Ans. Jonas Seely, A. J. Hanscom, John A. Horbach, and myself, when the deed was made. At the time it was delivered Jonas Seely, Lyman Richardson, myself, and other parties that I don't remember—I think John McCormick perhaps. It was delivered by me.

(Def'ts at the time witness spoke objected to the first clause of his answer as not responsive to the question.)

120 Int. 2 State whether or not any one directed you to deliver it to Jonas Seely.

(Objected to by complainant as leading.)

Ans. No, sir; they did not. I was directed by no one.

Int. 3. State what was said, if anything, by A. J. Hanscom as to whose name the conveyance should be made to at that time.

(Objected to by complainant as immaterial, irrelevant, and leading.)

Ans. He said he thought it would be better to be made in the name of Jonas Seely.

Int. 4. Had he any interest in fact in that land.

(Object'd to by complain't as immaterial, irrelevant, and leading.)

Ans. My understanding was that five acres of it was for A. J. Hanscom, the other half for Jonas Seely.

Cross-examination.

Int. 5. Was the deed from you to Mrs. Wallace made at the same time as the deed to Seely?

(Objected to by def'ts as not proper cross-examination, and it seeks to mislead the witness, he not having stated that any such deed had been made at all.)

Ans. That is a question I can't answer. I never made a deed to Mrs. Wallace in my life.

Int. 6. Was the certificate issued to you by the land officers on this purchase for this land assigned by you to Mrs. Wallace at the time you
121 made the deed to Seely?

(Objected to by def'ts as not proper cross-examination and leading.)

Ans. I don't know what land he has reference to.

Int. 7. You know what land is in dispute in this cause.

(Objected to by def'ts as not proper cross-examination.)

Ans. Yes, sir; I do.

Int. 8. State what it is.

(Objected to by def'ts as not proper cross-examination.)

Ans. It would be very hard for me to describe that piece of land, but I think it is ten acres, but I know it is the ten acres deeded to Seely.

Int. 9. Who deeded to him?

(Objected to by def'ts as not proper cross-examination and not the best evidence.)

Ans. I did.

Int. 10. How did you acquire a title which you conveyed to him by that deed?

(Objected to by def'ts as not proper cross-examination and not the best evidence.)

Ans. I only gave him a special warranty as against myself, and I acquired my title at a public sale at the United States land office in Omaha City.

Int. 11. Did you receive from the land officers, or either of them, a certificate for said land?

(Objected to by def'ts as not proper cross-examination and not the best evidence.)

122 Yes, sir.

Int. 12 Did you assign that certificate to Mrs. Wallace?

(Objected to by def'ts as not proper cross-examination and immaterial.)

Ans. I never assigned the certificate to Mrs. Wallace that included that land.

Int. 13. What certificate did you assign to her?

(Objected to as not proper cross-examination.)

Ans. A portion of the certificates I received from the land officer at this place.

Int. 14. What portion of that certificate did you assign to her?

Ans. I cannot describe it without a plat of the land.

Int. 15. Was it not all the land purchased by you as you have before on this examination stated, except the ten acres deeded by you to Seely?

(Objected to by def't as not proper cross-examination and not the best evidence.)

Ans. Yes, sir; it was, I think.

Int. 16. Was the ten acres deeded to Seely excepted to in the assignment of the certificate to her in terms?

(Objected to by def't as not proper cross-examination and not the best evidence.)

Ans. Yes, sir.

Int. 17. Did you ever see Mrs. Wallace?

(Objected to by def'ts as not proper cross-examination and immaterial.)

123 Ans. I don't know that I ever have.

Int. 18. Who represented her here at that time?

(Objected to by def'ts as not proper cross-examination and immaterial.)

Ans. Her agent, I suppose.

Int. 19. Who was her agent?

(Objected to as not proper cross-examination.)

Ans. Mrs. Horbach, I suppose.

Note.—Josiah S. McCormick, who was first duly sworn and examined and his testimony written by me as above, left my office without signing the same, and did not return to sign same. Wherefore, I hereby sign the said deposition.

DAN. GANTT, *Master in Chancery.*

APRIL 11TH, 1863.

Examination of witnesses resumed in this cause. J. M. Woolworth appears as sol. for complainants; Redick & Briggs appear as sol's for def'ts.

Byron Reed, a witness produced, sworn, and examined on part of defendants, says:

1. In answer to the second interrogatory, when you were before examined, you stated the conversation you had with John R. Porter was in the month of May. Do you desire to correct your testimony in regard to the

124 time? If so, state when it was and how you came to make the mistake.

Ans. I stated that I thought it was in the month of May, as I then thought the deed from Seely to Porter was made at that time. On referring to the deed I find it was made in February, 1861. For that reason I think the conversation with Porter therein referred to was had in the month of February, 1861, instead of May. I stated in my answer to the third interrogatory that I was unable to say whether it was before or after the making of the deed, and I don't wish to change that.

2. What is your best recollection on that point, and what do you know, if anything, of a notice being filed in the register's office that a caveat had been filed to set aside said sale, and what was said to Porter in regard to that, if anything?

Ans. I recollect of Porter telling me some of the details of his trade and what he was to pay, &c., from which I understood that the trade had been made, but whether the deed had passed or not I had no information. I knew that a notice was filed in the register's office immediately after the sale to McCormick. I don't recollect whether this was mentioned in my conversation with Porter.

3. Was that deed recorded in the office at the time you had that conversation?

125 (Here def'ts waived the answer to this question.)

BYRON REED.

THE TERRITORY OF NEBRASKA, *Douglas County, ss:*

I, Daniel Gantt, master in chancery in and for said county, do hereby certify that the foregoing witnesses, Josiah S. McCormick, John A. Horbach,

Byron Reed, A. J. Hanscom, and Wm. R. Demarest, were by me first duly sworn to testify the truth, the whole truth, and nothing but the truth; that the foregoing depositions, by them respectively subscribed, were reduced to writing by me in their presence, and by them subscribed in my presence, except the last deposition of J. S. McCormick, which I signed, and were taken at my office, in Omaha, at the several times therein stated.

Witness my hand this 11th day of April, A. D. 1864.

DAN. GANTT, *Master in Chancery.*

And thereupon, afterwards, to wit, on the 10th day of May, A. D. 1864, the said defendants filed in the office of the clerk of said court their motion to suppress the deposition taken in said cause, which said motion was
126 in the words and figures following, to wit:

In district court, Douglas County, in chancery.

JOHN R. PORTER AND WIFE, complainants,
vs.
JOHN A. HORBACH AND RICHARD WIGGIN, defendants.

And now came said defendants, by their counsel, and move the court to suppress the deposition of Jonas Seely, on the ground that it appears from said deposition and other testimony in the case that all the facts stated in said deposition were derived by said Seely as the attorney of said def't Horbach, and in a confidential capacity.

REDICK & BRIGGS, *Solicitors for Def'ts.*

And thereupon, afterwards, to wit, on the 16th day of May, A. D. 1864, there was filed and entered on the journal in the office of the clerk of said court a decree made in said cause by the court, William P. Kellogg, judge; which said decree was in the words and figures following, to wit:

At a district court, in chancery, held for the county of Douglas, at the city of Omaha, on the 16th day of May, A. D. 1864.

Present: Honorable William P. Kellogg, judge.

JOHN R. PORTER AND JANE M., his wife,
vs.
JOHN A. HORBACH AND RICHARD WIGGIN.

127 This cause came on to be heard upon the bill of complaint taken as confessed against said Horbach, the answer and supplemental answer of said Wiggin, and the replications thereunto and the depositions, and was argued by counsel, and the court being fully advised in the premises, it is ordered, adjudged, and decreed that the said John A. Horbach and Richard Wiggin, within twenty days from the date hereof, make, execute, acknowledge, and deliver a good and sufficient deed to the said complainant, Jane M. Porter, conveying to her the premises in question in this cause; that is to say, the south half of the following described pieces or parcel of land, commencing at the northwest corner of the southwest quarter of section fifteen, in township fifteen north, of range thirteen east of sixth principal meridian, running thence east forty rods, thence south forty rods, thence west forty rods, thence north forty rods, to the place of beginning; and in default of making, delivering, acknowledging, and executing such deed by the said defendants within the time above limited, that James G. Chapman, one of the masters of this court, make, execute, acknowledge, and deliver the same to said complainant; and the said defendants pay the costs of this suit to be taxed.

W. P. KELLOGG, *Judge.*

And thereupon, afterwards, to wit, on the 30th day of May, A. D.
128 1864, the said defendants filed in the office of the clerk of said court a notice of appeal in said cause; which said notice was in the words and figures following, to wit:

In district court, Douglas County, in chancery.

JOHN R. PORTER AND WIFE, complainants,
vs.
JOHN A. HORBACH AND RICHARD WIGGIN, defendants.

To said complainants:

Take notice that said defendants and each of them hereby appeal from the final decree of said court, rendered in this cause at the April term thereof, 1864, to the supreme court of the Territory of Nebraska.

REDICK & BRIGGS, *Solicitors for Defendants.*

THE TERRITORY OF NEBRASKA, *Douglas County, ss:*

I, J. H. Kellom, clerk of the district court of the first judicial district, within and for the county of Douglas, do certify that the foregoing transcript is a true and faithful copy of all the proceedings had and entered of record and on file in this office.

Witness my hand and official seal, at Omaha, N. T., this 11th day of July, A. D. 1864.

[SEAL.] J. H. KELLOM, *Clerk.*

Transcript	$29 30
Certificate and stamp	25
Stationery	45
	30 00

Costs in supreme court	$3 00
Transcript to U. S. Supreme Court	30 00
	33 00

Filed November 25, 1864.

1603

No 189

IN THE

SUPREME COURT

OF THE

UNITED STATES.

JOHN A. HORBACH and RICHARD WIGGIN, Appellants.

v.

JOHN R. PORTER *et ux.*

Argument for the Appellees.

This is an appeal from a decree of the Supreme Court of Nebraska.

Originally it was a bill in Chancery, filed by the appellees here, in one of the District Courts of that Territory. The case made by them will appear, from a summary statement of the contents of the bill.

In November, 1857, Horbach pre-empted a quarter section of land, of which the lands in question are a part. The Commissioner of the General Land Office, for certain reasons, vacated this entry, and ordered that the land should be sold at public auction, as an isolated and disconnected tract. This sale took place in December, 1860, at the Land Office in Nebraska, under the direction of the Register and Receiver thereof. The lands were bidden off, at the sum of $800, by and in the name of Josiah S. McCormick, who at-

tended the sale, and bid off the land, at the request and for the benefit of Horbach, and made payment therefor with $800 which Horbach furnished him for the purpose; and thereupon the usual patent certificate was issued by the Land Officers, to and in the name of McCormick, for Horbach. Horbach was at this time indebted to one Seely, an Attorney, for professional services; and on the same day McCormick, in pursuance of Horbach's direction, conveyed with special warranty to Seely, ten acres of the land so purchased by him; Horbach at the time promising Seely to make or cause to be made, any further necessary assurances, effectually to vest the title in him, should the public sale to McCormick be vacated; and Seely, relying on this promise, accepting the deed in satisfaction of Horbach's debt to him. This deed was, on the same day, duly recorded in the County Registry; and Seely entered into the premises so conveyed. On the 26th day of February, 1861, Seely sold and conveyed for $300, five of the ten acres to Mrs. Porter, the wife of John R. Porter, (the original complainants;) and the deed was on the following day recorded. Horbach knew of the negotiations between Seely and Mrs. Porter, while they were pending; and yet he stood by, concealed any interests he had, and suffered her to purchase the premises in ignorance of his claims. Immediately after the purchase, Mrs. Porter entered into the premises, and, at an expense of $150, cultivated, improved, and fenced, and has ever since occupied and possessed them. On the 1st of April, 1862, the Secretary of the Interior reversed the Commissioner's decision, touching the pre-emption entry, and restored it, vacated the public sale, and directed the $800 to be refunded to the person entitled to it, upon the return of the certificate made to McCormick. Thereupon Horbach returned the certificate to the Department, and received the $800; and the usual letters patent were, in virtue of his pre-emption entry, issued to him for the lands. The proceedings to obtain a restoration of the pre-emption entry were, during their pendency, unknown to and concealed from the

complainants. On the 23d of the same April during which these proceedings were had, Horbach and his wife conveyed to Wiggin the ten acres, deeded by McCormick to Seely. Wiggin had notice of Mrs. Porter's rights at the time, and now threatens to bring an ejectment to recover the premises.

The bill prays that the defendants be decreed to convey the lands in question to Mrs. Porter, and for an injunction, to restrain bringing an ejectment, and for general relief.

The defendants severally demurred to this bill. The demurers were overruled, and they had time to answer. Horbach failed to answer within the time limited by the Court, and the bill was taken as confessed against him.

Wiggin answered, admitting the pre-emption, the issuing of the patent, and Horbach's deed to him; denying that the proceedings to obtain a restoration of the pre-emption entry were unknown to or concealed from the complainants, and that he, at the time of his purchase, had notice of their interests; and alleging that he purchased in good faith, and for a good and adequate consideration. He denied the other allegations on information and belief. To this answer there was a replication.

These answers were replied to and proofs were taken; after all the proofs were taken, a supplemental answer was filed, assailing the validity of the public sale. A replication was filed to this answer, but no proofs were afterwards taken. A hearing, upon the pleadings and proofs, was had in the District Conrt, and a decree rendered according to the prayer of the bill. From this decree an appeal was taken to the Supreme Court of the Territory, which Court affirmed the decree below; and now this appeal is brought to reverse these decrees.

First Point.

McCormick bid these premises in for Horbach, and, as his trustee, received the title thereto.

1. The testimony in support of this position is as follows:

Augustus Macon, at folio 86 testifies:

"J. S. McCormick purchased them (the premises) for J. A. Horbach. My means of knowledge is this: Horbach, I think, the day of sale, or immediately after the sale, in the winter of 1860 or 1861, came into my office, and told me that J. S. McCormick had bid in the land for him; and paid for it with his money, he said."

Evert V. Smith testifies, at folio 68

"I suppose he" (McCormick) "bid it in for Mr. Horbach, as Mr. Horbach told me he was going to have him bid it in for him."

Jesse Lowe testified, at folio 64

"He" (McCormick) "bid it" (the quarter-section) "off for John A. Horbach. I knew from the facts and circumstances that transpired during the progress of the sale, and before and after."

In the answer to the preceding question, this witness testifies that he was present at a conversation between Horbach, Hanscom, Seely and himself, in which Horbach was endeavoring to induce those persons to aid him in purchasing a part of the land; and, at folio 0 he says they, Seely, Hanscom and himself, "were to protect Horbach as a bidder at the sale;" and again, he says he "had frequent conversations with him" (Horbach) "about the land," "before the sale, but none after."

Matthewson T. Patrick testifies, at folio 71

"About the 15th of December, 1860, Mr. Horbach told me, if McCormick bid on his land, not to interfere with him, for he had made arrangements for him to bid for him."

On cross-examination, he says "it is clear" in his head "that his" (Horbach's) "part was to be bid in by McCormick." This, he says, was not *John* McCormick, whose name he never heard mentioned in connection with the sale, but "*Dick*" McCormick, who, he afterwards says, is J. S. McCormick. By not interfering with McCormick, he says, Horbach meant, and he understood him, that he, the witness, was to interfere if others bid on the land. This witness also says, on his cross-examination, that he was "invited to attend the sale, and protect Horbach in bidding on the land," by "John A. Horbach."

Jonas Seely testifies, at folio 33 & 34

"Mr. Josiah S. McCormick made that bid; and it was made under my advice and direction given to Mr. Horbach. Mr. McCormick bid off that land in trust for Mr. John A. Horbach. I know this, by statements

made to me, both by Mr. McCormick and Mr. Horbach, and from the fact that I advised Mr. Horbach to have the matter so done. I know the money was furnished by John A. Horbach—at least, he told me so."

Andrew J. Hanscom testifies, at folio 76–77

"He" (McCormick) "did not bid it" (the land) "in for himself, but bid it in for Mr. Horbach. I was so informed by Mr. Horbach, and also heard both Messrs. Horbach and McCormick speak in relation to it. Previous to the sale, Mr. Horbach told me, if it was necessary to do so, he would have Mr. McCormick to bid it off for him; and after the sale, at Jonas Seely's office, on the same day of the sale I think, Horbach said that McCormick had bid it off for him. I don't know that I am able to state fully all that was said: but the manner in which the land was bid off was all talked over between McCormick, Horbach, Seely and myself."

Horbach, himself, at folio 103 and McCormick, at folio , swear that Hanscom and Seely were Horbach's attorneys and advisers in this matter.

Two of these witnesses (Macon and Smith) testify pointedly to Horbach's statements; one shortly before, the other shortly after the sale. Four other witnesses testify, not only to his statements, but to the fact; and of this, they show themselves necessarily informed; for Patrick was present to aid Horbach actively, and he governed himself by his directions. Lowe was advised with, and attended the sale to assist Horbach in his designs. Hanscom and Seely were Horbach's advisers, and directed the affair.

The testimony of these witnesses is supported by the circumstances.

1st. Horbach says, at folio 103 that the consideration for the deed was "the promise of Hanscom and Seely to sustain his (McCormick's) entry by purchase, and such services as they may have rendered him, at the sale, in bidding in the land." And he is shown above to have sworn that they were his attorneys, to protect him at the sale. It is incredible that Horbach's attorneys rendered the very services he had stipulated for to his competitor.

2nd. The fact that the money was Horbach's with which the land was paid for, is undisputed, (see Macon and Seely's depositions, cited above.)—Horbach denies making the statement to Macon, and that is the only testimony adduced by him on the point.

3rd. The circumstance that McCormick conveyed the remaining portion of the quarter-section to Horbach's mother-in-law, whom McCormick never saw, and who was represented "by her agent," "Mr. Horbach," and, so far as the case shows, without consideration, is decisive of the question.

See the cross-examination of McCormick, when recalled, at folio 224 and Horbach's deposition, when he says "Rebecca Wallace is the name

his wife's mother;" and Hanscom's deposition, folio and Smith's deposition, folio

McCormick and Horbach deny that the former bought the land for the latter. Their naked denials stand opposed to the testimony of six witnesses, and all the circumstances.

Second Point.

McCormick deeded the premises in question to Seely, under the direction of Horbach, and in satisfaction of a debt due from Horbach to Seely; and Horbach promised to make good the title so conveyed.

1. That Seely had rendered professional services to Horbach is shown by Mr. Macon, who, on his re-examination, says, at folio in answer to the question: "Who were Horbach's attorneys, in prosecuting his pre-emption claims; and what was the extent and value of the services so rendered?"

> "His attorneys were Jonas Seely and myself. In his case I did, comparatively, very little. Jonas Seely did most all the work. The services consisted in first trying the case before the Land Office, which occupied three days in examining witnesses and preparing the case." * * * * * * "I suppose the services were worth $1000."

Mr. Hanscom testifies to the same at folio

Mr. Seely testifies to the same at folio . in answer to the fourth interrogatory.

2. He was paid for his services by the conveyance in question. He says, at folio , in answer to the fifth interrogatory:

> "I was paid for the services I rendered Mr. Horbach by the conveyance of ten acres of land, made by deed executed by Josiah S. McCormick to me, on or about the 15th day of December, 1860, at Omaha. This deed was filled out by myself, in my office, in Omaha, on the day of its date, in the presence of Mr. A. J. Hanscom and J. A. Horbach, and taken by Mr Horbach to Mr. McCormick to be executed: and when it was executed Mr. Horbach delivered it to me."

After more particularly designating the land conveyed, and the agreement of Horbach, which he does in answer to the 10th and 11th interrogatories, he says, in answer to the 12th, "I did receive said conveyance of said ten acres of

land in satisfaction, payment and full discharge of my demand against said Horbach, with the further understanding between him and myself, that if he finally failed to establish or procure any title to said land he would pay me $1000 in money."

Mr. Hanscom testifies, at folio 77

"After the sale, at Jonas Seely's office, on the same day as the sale, I think, Horbach said McCormick had bid it off for him, and would deed the land in question as he had agreed to; and McCormick did make a deed to Seely, under the direction of Horbach, in accordance with Horbach's agreement."

A copy of the record of the deed, certified by the County Register, is in evidence. In section 13, page 82, Laws of Nebraska, 2d Session, it is provided: "The record of a deed duly recorded, or a transcript thereof duly certified, may also be read in evidence, with like force and effect as the original deed, whenever, by the party's own oath or otherwise, the original is known to be lost, or not to belong to the party wishing to use the same, nor within his control."

Mr. Porter testifies, at folio 77, that he has not and never had this deed. The objection that it is not shown to be lost, is untenable, for that is not necessary to entitle the copy to be read.

3. Horbach promised to make all further deeds effectually to vest the title in Seely, if the public sale should not be sustained.

Mr. Hanscom testifies, at folio 79

"At the time of the conversation alluded to, which was the time of the making of the deed by McCormick to Seely, I asked Mr. Horbach what he was going to have done with the balance of the land, over and above the ten acres deeded to Seely, and he said he was going to have McCormick deed it to his mother-in-law. I then asked him what he would do in case the sale was set aside in relation to the ten acres deeded to Seely, and he said that in case the sale was set aside, or the title conveyed by McCormick failed in any way, and he afterwards acquired title by virtue of his original pre-emption, or in any other manner, that he would make the title good to that ten acres, and would make whatever conveyance was necessary to do so; and upon that reppesentation, Mr. Seely accepted the deed in full payment for the services rendered, with the express understanding and agreement, that in case the title did fail, and Horbach, or any of his friends under his control, obtained title to the land afterwards, that the title to the ten acres conveyed to Seely should be made good; and Horbach agreed to make, or cause to be made, any conveyance that should be necessary to perfect title to the land."

Mr. Seely testifies, in answer to the last interrogatory, at folio 34

> "My agreement with Horbach was, that if my title failed under McCormick, and his pre-emption was sustained, he would cause a new conveyance to be made to me perfecting my title; if the pre-emption title and McCormick's title both failed, and he obtained title otherwise, he would perfect my title. If he failed to get title at all, he was to give me $1000 in money."

On all these points we have the naked denial of Horbach.

Third Point.

Horbach stood by, and concealed any claims he had in the premises from the appellees, and suffered them to buy and improve them; and he is now estopped to deny their title.

Mr. Porter, at folio 75, being inquired of whether Horbach knew Mrs. Porter was making the purchase while she was doing so, says:

> "I met Mr. Horbach one day on the street, and told him I was about buying five acres of that land he sold to Seely. He didn't make any answer that I know of. This was in February, 1861, before the completion of the purchase. Mr. Seely told me that Mr. Horbach's title was good; that McCormick had bid off the land for Mr. Horbach, and made a deed to him of the same, and the balance he had deeded to John Horbach's wife's mother; and that he had acquired these ten acres of land for legal services rendered for John A. Horbach, This was all the information I had. My wife had no information in the matter. I transacted the business for her." * * * * "He" (Horbach) "knew we were improving it; was there every few days, and never made any objection to the same."

Mr. Seely testifies, at folio 34 to much the same state of facts; while Mr. Horbach, as usual, contradicts Mr. Porter.

Fourth Point.

The appellant Wiggin is not a bona fide purchaser, without notice of Mrs. Porter's equities.

1. In his answer, and in his deposition as well, he denies notice at the time of his purchase, but not down to the time of the payment of the purchase-price. And he has himself

shown, in his deposition, that the payment of three-fourths of the price was deferred to a period long after the time of the purchase.

Boone v. Chiles, 10 Peters, 177; 281.

2. The recording act of Nebraska, (2d session laws, pp. 82–'4, sections 16 and 19,) contains not only the usual provisions of such statutes, but also a provision that the entry of a deed in the Index "shall be notice to all the world of the rights of the grantee conferred by such instrument."—This establishes another rule than that adopted by the courts of States where such a law does not exist, that the record is notice to only such parties as claim in the same chain of conveyances. Not only such persons, but *all the world* are affected by the notice. The deed from McCormick to Seely, and that of Seely to Mrs. Porter, were duly recorded. Although Wiggin holds title under another source, he is affected by the record. To place any other construction on section 19 is to make it mean no more than section 16.

3. Mrs. Porter's possession was also notice of all her rights. During the spring in which she purchased, she had the lot fenced, and broken up, and she has cultivated it ever since. She and her husband have worked on it. (See Mr. Porter's deposition, at folio 77 *see* 180

The rule is well settled, that a visible, actual and notorious possession, is notice to a purchaser that the possessor has some interest in the land. There are very many cases, in which a possession much less clear than that shown here, has been held to constitute notice.

In Krider v. Lafferty, 1 Wharton, 303, the grantee had planted, upon the land, willows, which he had cut and used every year in his business as a basket-maker; and his possession was held to be sufficiently notorious and actual, to supply a failure to register his deed.

In Johnston v. Irwin, 3 S. & R., 291, where the question arose on the statute of limitations, the Supreme Court of Pennsylvania says: "Residence is not necessary to make an adverse possession. Land may be enclosed and cultivated

4. The contract alleged in the answer, was not carried out.

See deposition of Hanscom, on his cross-examination, at folio 81
deposition of Lowe, on cross-examination, at folio 60

5. The inconsistency of this defense, with the denial of both McCormick and Horbach that McCormick bid the land off for Horbach, is very apparent and irreconcilable. Those witnesses here attempt to show that a combination, in fraud of the Government, was made, to which Horbach, McCormick, Seely, Hanscom and others were parties; that these men attended the sale, and by intimidation prevented a fair competition. If there was any combination, or any intimidation, these men were all acting together, for one common object. That object was to secure the land for Horbach.—The means used, or one of them, was McCormick's bidding for Horbach. And yet, in the very same breath that this defense is urged, it is insisted that McCormick was not bidding for Horbach.

6. The combination and intimidation, if any, were at Horbach's instance, (see deposition of Patrick.) "It is no part of the policy of the act to encourage frauds by releasing the fraudulent party from the obligation of his contract."—The proof, if it amounts to anything, "may be a confession of Horbach's own fraud, but it can give no right to commit another."

Fackler v. Ford, 24 Howard, 322, 332.

JAMES M. WOOLWORTH,
Of Counsel for Appellees.

190

2

IN THE

Supreme Court of the United States,

No. 189.

JOHN A. HORBACH AND RICHARD WIGGIN,
APPELLANTS,
vs.
JAMES BROWN, APPELLEE.

STATEMENT OF CASE.

In the year 1857, John A. Horbach, one of the appellants, settled upon, improved and claimed under the preemption law of 1841, the S. ½ of N. E. ¼, and S. ½ of N. W. ¼ of the Sec. No. 15, in Douglas County, in the Territory of Nebraska, and after making proof to the satisfaction of the Register and Receiver of the Local Land Office of the United States, at Omaha, in said county, of such settlement, occupancy, improvements, &c., did on the 21st day of November, in the year aforesaid, enter said tract from the United States, and to him was issued the usual certificate of entry.

Some time thereafter the City of Omaha, claiming that the said land so pre-empted by the said Horbach, was within the incorporated limits of said city, filed in the United States Land Office proceedings to vacate said entry, and such further proceedings were had, that on the 21st day of November, 1860, the Commissioners of the

General Land Office of the United States canceled the entry so as aforesaid made by the said Horbach, and the said tract restored to the body of the public lands; and the said land being an isolated tract, and never having been offered at public sale, ordered the same to be sold at public auction, after giving sixty days' notice thereof, which was so sold on the 15th day of December, in the year last aforesaid, and was purchased by Josiah S. M'Cormick, for the sum of $800.00; during all of which time the said Horbach, by himself and attorneys, were trying to maintain before the Land Department his original pre-emption entry of said tract, and after expending a large amount of money in expenses, attorneys' fees, costs, &c., and five years' anxiety in and about said land, on the 1st day of April, 1862, the Secretary of the Interior reversed the decision of the Land Department hereinbefore stated, and decided that the entry heretofore mentioned made by the said J. A. Horbach, of said tract, was and is valid and good, and that the public sale of said premises before mentioned was illegal and void, and about the date last aforesaid, the letters patent were issued to said Horbach to the tract of land aforesaid, thereby placing in him a perfect legal title to the same.

On the 15th day of December, in the year last aforesaid, said Josiah S. M'Cormick conveyed by deed in due form, to one Jonas Seely, ten acres of the aforesaid tract by him bought at said public auction, for the consideration, as expressed in the deed, of one dollar; and the said Seely, on the 1st day of February, 1861, conveyed the one half of the aforesaid ten acres, by deed in due form, to the appellee, James Brown, being the land in dispute; and on the 23d of April, in the year last aforesaid, the said J. A. Horbach conveyed by deed in due form to Richard Wiggin, appellant, the same ten acres of land conveyed by said J. S. M'Cormick to Jonas Seely, which includes the land in dispute.

THE PLEADINGS.

The bill alleges, among other things, that said Horbach was indebted to said Seely for legal services rendered for him in defending divers suits, causes and matters, and for work and labor, care and diligence bestowed at the instance and request of said Horbach, in a large sum of money, but what sum was to complainants unknown.

The bill further charges, that John A. Horbach employed said J. S. M'Cormick to bid said tract of land in for him at said public auction, and that he did so bid it in for said Horbach, and paid for the same with the money of said Horbach, and that M'Cormick was nothing but a trustee; and further alleges, that the said Horbach ordered and directed the said M'Cormick to make the conveyance to the said Seely of the ten acres aforesaid, and in consideration of said conveyance, said Seely discharged the said Horbach from his aforesaid indebtedness to him, and that the said Horbach did make certain promises to the said Seely, that he, said Horbach, would warrant and defend the title given by M'Cormick to Seely to said land.

The bill further alleges, that at the time said Richard Wiggin purchased said land from said Horbach, he had full notice of the equities of the complainant; and at the time the complainant, Brown, bought the tract in dispute from the said Seely, said Horbach knew it but made no objection, and that the complainants had no knowledge of the claim of said Horbach to said tract, but bought the same in good faith and for value, and ask the respondents to answer the allegations of the bill under oath.

The respondents, Horbach and Wiggin, filed demurrers to the bill, which at once were overruled by the Court.

See demurrer of Horbach, on pages 9 and 10 of Record; demurrer of Wiggin, page 11.

Leave was given to the said Horbach to answer the bill of complaint on the 12th day of November, 1863, which he failed to do, and thereupon his default was entered, although there was an affidavit on file showing why his answer was not filed at the time required by the Court. See affidavit of Clinton Briggs, page 22 of Record. But said Horbach's right to answer thereafter was refused by the Court, and the bill taken *pro confesso* against him, said Horbach.

The said Wiggin, appellant, on the 11th day of April, 1864, filed his supplemental answer under oath, alleging among other things, that the said public sale was irregular, fraudulent and void, in this:

1st. There was a combination of armed men met at said sale and prevented others from bidding on said land, and that the land was sold for about five dollars per acre, when in fact if a fair sale had taken place the land would have brought as high as fifty dollars per acre.

2d. Sixty days notice of said sale was ordered to be given by the United States Land Commissioner, and the land was sold upon thirty days notice. See letter of Commissioner, Record, p. 41.

Replication was filed by complainants to the answer of Wiggin, and the issue being fully made up, the case was referred to Daniel Goutt, one of the Masters of the Court, to take and report the testimony. Proofs were taken, and on the 16th day of May, 1864, the case was tried in the District Court and decree rendered for complainants. An appeal was taken to the Supreme Court of the Territory, which affirmed the decree in the Court below, from which decision an appeal was taken to this Court.

BRIEF OF APPELLANTS.

I.

The decree in the Court below ought to be reversed as against Horbach—

1st. Because the Court refused to permit Horbach to answer the bill after an affidavit being filed showing that he had a meritorious defense to the action, and by sickness was prevented from filing his answer at the time required by the Court. See affidavit of Clinton Briggs, p. 22, fol. 54.

2d. Neither the allegations of the bill nor the testimony make such a case as to entitle the appellee to the aid of a court of equity.

Witness Seely states that Horbach promised if he, Seely, failed to get title to the land, that he, Horbach, would pay Seely $1,000 in cash. See deposition of Jonas Seely, p. 14, fol. 34.

Witness Lowe states, on page 26, fol. 64, that Horbach agreed to pay Hanscom and Seely $500 each for their services. Now we insist that because Seely's title to the land did fail and passed into the hands of Wiggin, an innocent purchaser, that Seely had a perfect remedy at law against Horbach for the $1,000.

3d. The verbal warranty of Horbach, if proven, would not avail the appellee anything, for the reason, when M'Cormick made the deed to Seely he *refused* to warrant the title generally, and gave a special warranty against his own acts. And if the theory of the appellees is true, that it was the deed of Horbach, then certainly the terms of the deed on its face ought to express the intent of the parties.

4th. A covenant of warranty to lands in order to be valid must be in writing, and equity will not enforce a parol contract. See 13 John. 236; 11 Pick. 439; 3 Mason, 170; 2 Hilliard, Real Pro. 380; Laws of Nebraska, 1856, p. 90, s. 3.

5th. The testimony of Seely and Hanscom should have been suppressed on the motion interposed, on the ground that the same disclosed the confidential communications of a client to his attorneys. Page 47, fol. 114. See Green. Ev., sections 237 and 240, and cases there cited. It is clearly proven that Hanscom was the attorney of Horbach in this matter. Witness Jesse Lowe states that Horbach agreed to pay Hanscom and Seely $500 each. Hanscom himself states, on page 34, at fol. 82, that he told Horbach any arrangement he made with Seely would be satisfactory to him, and he would assist Mr. Seely; and when asked by M'Cormick to whom he should make the deed of ten acres of land, he, Hanscom, replied, Make it to Jonas Seely, *because* he would have to appear as a witness before the Land Office, and did not want to be known in the matter. See testimony of M'Cormick, page 42, fol. 101. This shows that Hanscom was the attorney of Horbach as well as Seely, and their knowledge of the matter they obtained as his counsel, and ought not to disclose it. The proper objections were made to Mr. Hanscom's testimony before the Master and in the Court below.

II.

It is immaterial what view of the case the Court may take as to Horbach's liability or his good or bad faith in these transactions, for Wiggin can in no way whatever be affected, as the record shows *conclusively* that he is a *bona fide* purchaser for a valuable consideration without notice. See answer of Wiggin, at page 16 to page 18. See testimony of Wiggin, page 20, from folio 50 to 51. His answer was called for under oath. See bill of complainants, page 7, folio 18.

1st. The answer, when responsive to the bill, is evidence for Wiggin, and it requires the testimony of two witnesses to overcome it. See 2 John Ch. 92; 3 Wheat. 527; 1 Paige. 239; 2 Blakf. 324.

2d. Innocent purchasers are entitled to great favor in a court of equity. See 2 Eq. Leading Cases, pt. 1, 36, 86, 88, 99, 100; 2 Story's Eq. Jr. 1502–3.

3d. Wiggin holds the *legal title*, and even if the equities were equal he must prevail.

4th. Wiggin had no *actual* notice of the appellee's equity (if any he has). The record is *conclusive* on this point.

5th. He had no *constructive* notice. The record of the deed from M'Cormick to Seely and Seely to appellee was no notice to Wiggin. Same Leading Cases, 129. See *Bates vs. Norcross*, 14 Pick. 224; 10 Watts, 412.

6th. The appellee had not such a possession of the land when Wiggin purchased as to put him on enquiry, or to amount to constructive notice. Horbach and not Brown was in the actual occupancy of the lands at that time, as well as at the time and before Brown purchased of Seely. See allegations of bill and testimony of Horbach, fol. 7, page 3, and fol. 105, page 44.

7th. Possession in order to affect a purchaser with notice must be *actual*, *unequivocal* and *notorious occupancy* of the land. Same Leading Cases, 118.

Grimstone vs. Carter, 3 Paige, 436;
Brown vs. Anderson, 4 Littell, 201;
Buck vs. Holloway, J. J. Marshall, 180;
Lands vs. Brant, 10 Howard U. S., 348;
32 N. H. 382; 2 Foster, 500; 8 N. H. 264.

III.

The appellee had notice of Horbach's rights and claim to the lands when he purchased of Seely. See Horbach's testimony, page 44, fol. 105.

REDICK & BRIGGS,
Solicitors for Appellants.